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IN THE

Supreme Court of the United States

October Term, 1979
No. .....

CITY OF LOS ANGELES, *et al.*, *Petitioners,*

vs.

FANCHON BLAKE, *et al.*, *Respondents.*

CITY OF LOS ANGELES, *et al.*, *Petitioners,*

vs.

UNITED STATES, *Respondent.*

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

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vs.

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CITY OF LOS ANGELES, *et al.*, *Petitioners,*

vs.

UNITED STATES, *Respondent.*

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

The Petitioners, City of Los Angeles, *et al.*,[1] (hereinafter, "City"), respectfully pray that a Writ of Certiorari issue to review the judgments and opinions of the United States Court of Appeals for the Ninth

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[1]In addition to the City of Los Angeles, the Petitioners in *Blake* consist of all of the Defendants in the Court below, including the City of Los Angeles Board of Civil Service Commissioners, and the board members or former members named in the Amended Complaint (filed October 26, 1973): William I. Maltz, Arnett L. Hartsfield, Jr., Sue K. Young, and Dr. John C. Bollens. Additionally, the Petitioners include the City of Los Angeles Board of Pension Commissioners, and the board members or former members named in the Amended Complaint:

(This footnote is continued on next page)

Circuit entered in *Blake, et al.*[2] *v. City* and *United States v. City* on May 2, 1979. In filing a single petition pertaining to those two cases, the City is proceeding under Rule 23(5) of the Rules of the Supreme Court.

Opinions Below.

The opinion of the Court of Appeals in *Blake v. City of Los Angeles* is not yet officially reported, and it appears as Appendix A at pp. 1-37, *infra*. That decision has been unofficially reported at 19 FEP Cases 1441. The decision of the United States District Court for the Central District of California granting summary judgment to the City in *Blake* is reported at 435 F.Supp. 55, and is unofficially reported at 15 FEP Cases 76 and 14 EPD ¶7668. That decision is reprinted as Appendix B at pp. 38-61, *infra*.

The opinion of the Court of Appeals in *United States v. City of Los Angeles* is not yet officially

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Leon Savitch, Jack Borman, Steven Gavin, Olga Marcus, Joel M. Winitz and Sam Bianitto. The Petitioners also include Edward M. Davis, formerly Chief of Police, Los Angeles Police Department.

In addition to the City of Los Angeles, the Petitioners in *United States v. City of Los Angeles* include the following individuals named in their official capacities and their successors in office: Muriel Morse (formerly General Manager, Civil Service); Irene Tovar, E. Thomas Fizzolio, Dr. John Bollens, Dr. Ruth Boak, and Arnett Hartsfield, Jr. (members or former members of the City of Los Angeles Board of Civil Service Commissioners); Samuel L. Williams, Marianna Pfaelzer, James Fisk, Salvador Montenegro and Stephen Reinhardt (members or former members of the City of Los Angeles Board of Police Commissioners) and Edward M. Davis (formerly Chief of Police, Los Angeles Police Department).

[2]In addition to Fanchon Blake, the Respondents in *Blake* include Michael Wendler, Leona Vess, Carol Stamey. Shirley Walton, once a named Plaintiff in the action below, was the subject of a voluntary dismissal on November 10, 1976.

reported, and it appears as Appendix C at pp. 62-68, *infra*. That decision has been unofficially reported at 19 FEP Cases 1455. The opinion and order of the District Court in that matter were unofficially reported at 16 FEP Cases 229 and 14 EPD ¶7785, and are reprinted at Appendix D and Appendix E, respectively, at pp. 69-71 & 72-73, *infra*.

Jurisdiction.

The judgments of the Court of Appeals for the Ninth Circuit were entered in both cases on May 2, 1979, and this Petition for Certiorari is being filed within 90 days of that date. This Court's jurisdiction is being envoked under 28 U.S.C. §1254(1).

Questions Presented.

1. Does Title VII of the Civil Rights Act of 1964, as amended (hereinafter "Title VII"), require a local government to change the manner in which the job of police officer is performed (*i.e.*, providing for the use of greater force, such as a baton or nightstick, rather than for the more physically demanding hand control holds in effectuating an arrest) merely because those different policies would permit selection standards having less "adverse impact" upon women as a class, or does that Act and/or the constitutional concepts of federalism permit a local government to establish its law enforcement policies and to select the most qualified candidates to perform the tasks required by those policies?

2. Assuming a *prima facie* case of discrimination as to the height requirement (5'6") and the physical abilities test used in the selection of Los Angeles Police

Officers, does Title VII forbid the use of those selection standards unless the City submits formal validation research studies demonstrating that those standards are directly related to the business necessity, or may the City meet its burden of proof under some alternative standards, such as by submitting competent and relevant evidence that those standards are related to the job of Police Officer in Los Angeles?

3. Does Title VII shift the burden of proof against a municipal employer upon showing of "adverse impact" on a personnel test despite rebuttal evidence that such impact is not probative of purposeful discrimination, or is such an interpretation inconsistent with either Title VII or constitutional concepts of federalism and the Tenth Amendment?

4. Did the City's pre-July 1, 1973 maintenance of separate gender-based job classifications of "Policeman" (the classification that was assigned general patrol assignments) and "Policewoman" (the classification generally assigned to inside tasks including juvenile and administrative work) violate the equal protection clause of the Fourteenth Amendment to the United States Constitution?

5. Was the continued use of gender-based police classifications during a transitional period between March 24, 1972 and July 1, 1973 justified under Title VII by the doctrine of business necessity?

6. In *United States v. City of Los Angeles,* did the District Court err as a matter of law when it issued a preliminary injunction to enjoin a termination of funds distributed by the Law Enforcement Assistance Administration (hereinafter "LEAA") to the Los Angeles Police Department, when that injunction was necessary to maintain the status quo during a stay of proceedings pending the resolution of *Blake,* and where the Government was prosecuting its case because of the City's failure to accept Justice Department mandated goals or quotas for the hiring of Blacks, Hispanics, and women?

Constitutional and Statutory Provisions Involved.

The Tenth Amendment and §§1 and 5 of the Fourteenth Amendment to the United States Constitution are set forth as Appendix F hereto, at p. 74, *infra.* Relevant provisions of Title VII of the Civil Rights Act of 1964, as amended (§§703(a) and (h)), and the Omnibus Crime Control and Safe Streets Act of 1968, as amended (§§518(a), (b), (c)(1) and (c)(2)(E)), are set forth as Appendix G (at pp. 75-76, *infra*) and Appendix H (at pp. 77-78, *infra*), respectively.

Statement of Case.

The cases described below arise from challenges to the personnel practices of the City of Los Angeles (hereinafter, "the City"), as those practices relate to sworn positions in the Los Angeles Police Department. In *Blake v. City of Los Angeles,* the jurisdiction of the District Court was claimed under 28 U.S.C. §§1343 (3) and (4). That action was brought under Title VII of the Civil Rights Act of 1964, as amended by the Equal Employment Opportunity Act of 1972, 42 U.S.C. §2000e *et seq.* ("Title VII"); under 42 U.S.C. §1983; and under the Fourteenth Amendment of the United States Constitution.

The claims of the Plaintiffs in *Blake* (hereinafter, "Plaintiffs") involved three time periods: (1) The pe-

riod prior to the extension of Title VII to include governmental entities (March 24, 1972), when the City maintained "Policeman" and "Policewoman" classifications; (2) the period between the extension and the creation of the City's "Police Officer" classification (July 1973); and (3) the period subsequent to July 1973, when men and women competed on an equal basis for Police Officer jobs. As to the latter period, the Plaintiffs specifically complained of the City's height requirement (currently 5′6″) and its physical abilities test.

On May 13, 1977, the District Court granted the City's motion for summary judgment in *Blake*. Twenty days thereafter, *United States v. City of Los Angeles* was filed by the Attorney General pursuant to Title VII; the State and Local Fiscal Assistance Act of 1972, as amended (31 U.S.C. §1242); and the Omnibus Crime Control and Safe Streets Act of 1968, as amended (42 U.S.C. §3766(c)(3)). Jurisdiction was claimed under 31 U.S.C. §1242, 42 U.S.C. §2000e-6(b), 42 U.S.C. §3766(c)(3), and 28 U.S.C. §1345. In that suit, the Government sought to raise many of the same issues which had been decided in *Blake*. However, the District Court stayed the Government's action pending appeals in *Blake,* and issued a preliminary injunction to maintain the status quo during that stay. The Government appealed the issuance of that injunction.

The development of those two related cases, and the decisions of Circuit Court, are discussed chronologically in the following paragraphs.

A. The Use of Sex-Based Classifications Prior to July 1973.

Prior to 1973, as the District Court found,

> the City maintained the separate classifications of "Policemen" and "Policewomen". . . . Although Policemen and Policewomen were both sworn officers, they had different lines of promotion and different types of duties. Policemen were assigned to the more physical tasks, including work on patrol and in the field. Policewomen generally were assigned to specialized tasks and inside work. [App. B, at p. 40. See also App. A, at p. 2.]

The City's use of the "Policewoman" classification during that time period was similar to the policy in other United States cities. Beginning in 1971, there had been a limited movement in certain cities to place women in patrol positions. *Blake* Record (hereinafter, "B.R.") 2213-19. However, when the City implemented the "Police Officer" classification in 1973, most police departments still utilized women in a limited civil service classification. B.R. 2219-20.

On June 12, 1973, the City Council voted to create the general classification of "Police Officer". B.R. 2208. Thereafter, men and women candidates who became field certified Police Officers performed the job previously done by Policemen. B.R. 2187 & 2418. As the District Court found, "The uncontradicted affidavits filed by the defendants detail the activities of those in charge of formulating and implementing the reorganization of the Department", and "the time required to put the revised hiring practices into effect was not unreasonable under the circumstances." App. B, p. 47. Under the new system, an applicant was required to have a minimum height of 5′7″, but that

requirement was reduced 5'6" less than a year later. "An applicant was also required to pass a physical abilities examination designed to test physical endurance, strength, and agility."[3] App. B, p. 47.

B. The Development of the Blake Case in District Court.

In 1973, *Blake v. City of Los Angeles* was filed as a challenge to the various police personnel practices as those practices applied to women. The Plaintiffs challenged the pre-July 1973 use of "Policeman" and "Policewoman" classifications, and the City's selection standards for the post July 1973 classification of Police Officer.

Regarding the Police Officer hiring standards, the Plaintiffs asserted that the adverse impact on women as a class of the City's height requirement and physical abilities test shifted the burden of proof, and required the City to "validate" those requirements. The District Court recognized that proportionately fewer women

[3]The District Court described that test as follows:

> This test consists of five events; each event is graded on the basis of 1-100, according to the candidate's performance. The combined score on all events must equal or exceed 350. These tests are:
>
> 1. Wall scale—run a total of 50 yards then scale a smooth wall 6 feet high. (17 seconds)
> 2. Maintain grip—run a total of 50 yards then take an overhand grip on a chinning bar and maintain grip for one minute. (16 seconds run plus 60 seconds on the bar)
> 3. Weight drag—run 50 feet then drag a dead weight of 140 pounds for 50 feet. (16 seconds)
> 4. Tremor test—run a total of 50 yards then hold a stylus steady for 17 seconds. (17 seconds run plus 100 points on the stylus)
> 5. Endurance run—run as many laps as possible in 12 minutes on a one-eighth mile track. (10 laps)
>
> (The performance in parenthesis is that which will yield the average passing score of 70 points per test.) [App. B, pp. 47-48.]

candidates pass both the height requirement and the physical abilities test. However, the Court found that "uncontradicted evidence" rebutted any inference of discrimination which might have required a shifting of the burden of proof to the City. App. B, p. 54. That evidence included facts pertaining to the different physical ability of males and females. See B.R. 2260 & 2291. See, also, n. 21, *infra*, at p. 29. The Court of Appeals also found no disputed material facts, but reversed the District Court as a matter of law, holding that "a showing of disproportionate impact is all that is required to establish a *prima facie* case of discrimination. . . ." App. A, p. 11.

In moving for summary judgment, the City submitted uncontradicted affidavits showing the relationship between the City's standards and various physical tasks performed by Police Officers. As part of that showing, the City submitted affidavits that relatively taller and stronger Police Officers are able to subdue resisting suspects with a lesser degree of force. B.R. 2306-08 & 2419.

Although the City disagreed that formal statistical validation studies were legally required, the City also contracted for the production of an extensive job analysis and two formal statistical validation studies which demonstrated (1) that officers who were 5'8" or 5'9" used strong force 31 percent more frequently than did officers who were six feet or taller (B.R. 1995 & 2009); (2) that, once an officer was forced by the level of the suspect's resistance to utilize a bar-arm control hold,[4] a taller officer was more likely

[4]The bar-arm control is applied by moving a resisting suspect so that the officer may apply pressure with his or her forearm

(This footnote is continued on next page)

to better perform that control hold against a moderately resisting suspect; and (3) that the City's physical abilities test was correlated significantly with simulations of police tasks including foot pursuits, field shooting, and emergency rescues.[5]

In addition, a study which had been prepared by an expert employed by the City demonstrated that four of the five events used in the physical abilities test were predictive of success in at least seven of the eleven measures of success in the police training academy. The fifth test event, the "tremor test", proved to be predictive of success in shooting, which is the behavior which that event was intended to predict. B.R. 2195.

In response to the City's evidence of statistical corroboration of the job-relatedness of height and the physical abilities test, the Plaintiffs submitted the affidavit of their expert, James J. Kirkpatrick, to attest to certain purported methodological deficiencies.[6] Dr. Kirkpatrick did not take the position that the City's requirements were not job-related (see B.R. 3603-04), nor did he state that the City's validation studies were not professionally acceptable. Additionally, the Plaintiffs submitted copies of certain City studies, and a number of depositions of individuals from other police

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to the suspect's trachea. When properly applied, the hold causes unconsciousness by stopping the flow of oxygen to the brain. See B.R. 2076.

[5]Mahaffey Affidavit at pp. 5-6, and the attached Exhibit B. Those documents were forwarded to the Ninth Circuit as "non-reproducible" portions of the record.

[6]In 1970, Dr. Kirkpatrick submitted a similar affidavit in a case pertaining to the Washington Metropolitan Police Department. That document was printed in the Appendix, *Washington v. Davis*, Supreme Court No. 74-1492 at pp. 53-57.

agencies relating to performance of women officers who did not meet the City's physical standards.

The Plaintiffs' depositions demonsrated that other Police Departments have restructured their policies or their jobs to accommodate shorter and weaker Police Officers. For example, when the Washington Metropolitan Police Department reduced the height requirement from 5′7″ to 5′0″, it began teaching its neck-applied control hold (a bar-arm control hold) by having the simulated suspects in the training academy get on their knees so that officer being trained could properly apply the control hold.[7]

Other departments permit higher levels of force to be used against suspects. In New York City, in contrast to the Los Angeles Police Department policy of using minimum force, women police officers were taught "gouging the eyes, [and] groin kicks" to control suspects.[8] As one woman officer stated, "In other words, you don't really throw them but you have to kind of—I hate to use the term—'Finish them off'. . .."[9] In the Boston Police Department, if an officer cannot resolve a physical confrontation by talking to the suspect, he or she utilizes a police baton, rather than restraining the individual by wrestling or by a control hold.[10]

Based upon its review of the affidavits, depositions, and studies, the District Court found that the evidence

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[7]Deposition of Robert Shupe (filed February 9, 1977) at page 54.

[8]Deposition of New York City Police Officer Lucille Burrascano (filed February 9, 1977) at page 79.

[9]*Id.*

[10]Deposition of Boston Police Commissioner Robert di Grazia (filed February 9, 1977) at pages 66-68.

presented no material issues of fact requiring a trial, and granted summary judgment to the City. App. B, p. 61.

C. The Government's Case in District Court and the Court of Appeals.

Following the District Court's decision, the Attorney General filed his complaint in *United States v. City of Los Angeles,* alleging sex, race, and national origin employment discrimination in the Los Angeles Police Department. As a result of that filing, federal funds administered by the Department of Justice's Law Enforcement Assistance Administration (hereinafter, "LEAA") and received by the Los Angeles Police Department would have been terminated by operation of law[11] on or about July 18, 1977. Prior to that date, the District Court stayed any further action in the Government's case pending the appeal of *Blake v. City of Los Angeles,* and enjoined the termination of LEAA funds to maintain the status quo during that stay. The Government appealed from that preliminary injunction.

The filing of *United States v. City* culminated a two year series of communications between the City and the Government by which the Government attempted to require the City to establish numerical goals or quotas for the employment of minorities and women as police officers. Record in *United States v. City* (hereinafter, "U.S. R.") 49-55 & 724-25. After the District Court stayed the Government's action, Assistant Attorney General Drew Days, III, of the Civil

[11]Those funds would have been terminated pursuant to §122 (b) of the Crime Control Act of 1976, amending §518(c)(2)(E) of the Omnibus Crime Control and Safe Streets Act of 1968, 42 U.S.C. §3766(c)(2)(E), *infra,* at pp. 77-78.

Rights Division, explained the filing of its action, stating, "Our suit against the Los Angeles police department was based in part on a referral from LEAA after it had failed to meet grant requirements to increase minority and female percentages."[12]

Following the filing of the Government's suit, the City obtained a preliminary injunction to ensure the continuity of certain programs receiving LEAA funding. In the absence of that injunction, the loss of LEAA funds would have resulted in the loss of funding for a program to break the network of violent juvenile gangs, primarily in minority communities. Federal funds received through LEAA had permitted the Los Angeles Police Department to divert 30 officers and 14 radio cars from regular functions to the suppression of gang-related crime, and preliminary figures indicated a 22 percent decrease in those crimes since a pilot program in 1976. U.S. R. 524-25 & 529.

If the City had lost that program, citizens in certain communities would have experienced a sharp increase in gang violence. U.S. R. 526-27. That eventuality was forestalled by the District Court's injunction. However, on May 2, 1979, the Court of Appeals reversed that injunction, reasoning that the District Court's order could not be justified by its desire to maintain the status quo during the pendency of a necessary stay of proceedings. See App. C, p. 68.

[12]U.S. Department of Justice, "Remarks of Drew S. Days, III, Assistant Attorney General, Civil Rights Division, Department of Justice, before the National Black Policemen's Association, New Orleans, Louisiana on August 25, 1977" at page 6. That official document was later republished by the *Los Angeles Daily Journal Report* No. 77-13 (October 21, 1977) at pages 28-30.

D. The Court of Appeals Decision in Blake.

In its companion decision, the Circuit Court reversed the District Court's summary judgment in *Blake*, and granted summary judgment to the Plaintiffs (who had not filed a formal motion for summary judgment) for two of the three challenged time periods. First, the Circuit Court held that "the gender-based classification system [*i.e.*, the use of "Policemen" and "Policewomen"] used by [the City] before Title VII became applicable to governmental agencies violated the equal protection clause of the Fourteenth Amendment"; and, second, that the City's "use of sex-segregated job classifications between March 24, 1972, and July 1, 1973, violated Title VII because it was not mandated by business necessity. . . ." App. A, p. 2.

Third, the Circuit Court remanded the portions relating to the lawfulness of the City's Police Officer personnel tests, and set forth the following legal standards which the District Court is to apply.

(a) *Prima Facie Case/Constitutional Issue*—In response to the District Court's holding that the 1972 amendments to Title VII (promulgated pursuant to the Fourteenth Amendment) could not have constitutionally extended the so-called "impact test" to local governmental entities, the Circuit Court held that statistics showing "disparate impact" will shift the burden in a case involving personnel testing, even in the absence of any showing that those statistics are probative of discrimination. App. A, p. 11.

(b) *Employer's Burden in a Testing Case*—Although the District Court had found the City's selection standards to be lawful because "competent and relevant evidence" demonstrated their "job relatedness",

the Circuit Court held that " '[j]ob relatedness' is relevant only for the purpose of trying to prove that the characteristics which the various tests select are directly related to the business necessity." App. A, p. 17. The Circuit Court then characterized the " 'business necessity' defense" as "very narrow", and held that the District Court's judgment must be reversed because the City's rational evidence and the three statistical validation studies had not demonstrated that the Police Officer standards were "so job related as to be justified by business necessity." App. A, p. 18. That Court rejected the City's formal validation studies, in part, because the City had not hired and trained Police Officers shorter than 5'6" to participate in those studies. App. A, p. 24.

(c) "*Search for Alternatives*" —To "avoid repetition of error" by the District Court, the Court found that "Title VII may indeed require modification of [law enforcement] policies" to eliminate the need for job related selection standards which have an adverse impact against any particular sex or racial group. App. A, p. 30.

REASONS FOR GRANTING THE WRIT.

In the following pages, the City discusses the reasons for granting the writ in the context of each of the major burdens in a Title VII case: the *prima facie* case, the employer's demonstration of the lawfulness of its testing procedures, and the plaintiff's showing of pretext or "alternatives". Because the rule of law established by the Circuit Court for a plaintiff's showing of alternatives is most devastating to the role of local law enforcement, the City considers those burdens in reverse order. Finally, the City considers the Circuit Court's grant of summary judgment on the issues involving the obsolete gender based classifications, and its reversal of the District Court's preliminary injunction.

I

The Ninth Circuit's Rule That Law Enforcement Policies Must Be Changed Merely to Permit a Larger Percentage of Women to Be Hired Is a Threat to the Constitutional Doctrine of Federalism and Is Contrary to Title VII of the 1964 Civil Rights Act.

In *Blake*, the Ninth Circuit established a new standard for evaluating the availability of "less discriminatory alternatives". As interpreted in *Blake*, Title VII requires the "modification of [law enforcement] policies", if such modification will enable the department to hire individuals with less physical ability. App. A, pp. 30-31. As a preliminary matter, that requirement conflicts with the reasoning of *Furnco Construction Corp. v. Waters*, 438 U.S. 567, 577-78 (1978), in which this Court stated that Title VII "does not impose a duty to adopt a hiring procedure that maximizes the hiring of minority employees." *Id.*

More importantly, however, the Ninth Circuit's view that Title VII requires a police department to change

law enforcement policies which have been established by the community violates the concepts of federalism established in the United States Constitution including the Tenth Amendment. This Court has recognized that police protection is a function which state and local governments "are created to provide . . . ." *National League of Cities v. Usery*, 426 U.S. 833, 851 (1976). Indeed, "[t]he promotion of safety of persons and property is unquestionably at the core of the State's police power . . . ." *Kelley v. Johnson*, 425 U.S. 238, 247 (1976).

Unlike other police departments having lesser physical standards,[13] the Los Angeles Police Officer must "aggressively pursue the performance of his or her duty", but that duty "must be performed with a minimum use of force." B.R. 2419. See App. B, page 56. To require the City to modify the Police Officer job by reducing the arrest activity expected of an officer,[14] or by increasing level of force which may be utilized against a resisting suspect,[15] interferes with the "well-

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[13]See page 11, *supra*.

[14]For example, Block & Anderson, *Policewomen on Patrol, Final Report* (Police Foundation, 1974) reported that, of a matched group of 86 women and 86 men hired by the Washington Metropolitan Police Department, the men's group (which averaged an inch and a half taller and 32 pounds heavier than the women's group) made approximately three times the number of felony arrests and more than twice the number of misdemeanor arrests made by the women's group. *Id.* at 23. The male group also issued more than twice the number of traffic citations. Id. at 24.

[15]Two of the "major findings" of a 1977 study by the Police Foundation are (1) that "[p]olice departments differ widely in their policies and review procedures relating to the use of deadly force . . ."; and (2) "rates of shootings by police officers vary widely among jurisdictions . . . ." C. Milton, et al., *Police Use of Deadly Force* (Police Foundation, 1977) at 10.

established rule that the government has traditionally been granted the widest latitude in the 'dispatch of its own internal affairs. . . .'" *Rizzo v. Goode,* 423 U.S. 362, 378-79 (1976). Thus, this Court is urged to grant the Writ to ensure that local police departments may continue to establish law enforcement policies on the basis of local needs and priorities, rather than to maximize the percentage of women employed as police officers.

II

The Ninth Circuit's Burden on an Employer Utilizing a Personnel Test Is Impossible to Meet, and Conflicts With Existing Law and Professional Standards.

In holding that the City had not met this burden of proving the lawfulness of its height requirement and physical abilities test, the Circuit Court in *Blake* adopted a standard of proof for employers which will be impossible to meet. That burden appears to signal the deathknell of this action and threatens the future of personnel testing in the Ninth Circuit.

The Court held that testing devices having adverse impact on any race or sex group must be shown to be "so closely job related that their use is 'necessary to safe and efficient job performance.'" App. A, pp. 19-20. The Circuit Court rejected the City's proof that the physical abilities test had been carefully constructed, that both the height requirement and the physical abilities test were rationally related to specific tasks of the job, and that both were consistent with the civil service merit system mandated by the Charter of the City of Los Angeles. That Court also rejected the City's two job analyses and three professional validation studies as demonstrating the lawfulness of the City's selection devices.

A. The Circuit Court's Burden on an Employer Signals the Deathknell of This Action and Threatens Personnel Testing in This Circuit.

In rejecting the City's extensive validation evidence, the Circuit Court created several insurmountable burdens on employers utilizing merit systems or personnel tests which have adverse impact on any group. For example, the Circuit Court held that formal research studies are the only evidence permitted to prove that a test is "directly related to the business necessity" (App. A, p. 17), and also requires, *inter alia,* that an employer must hire lesser qualified individuals to prove that the previously established standards are "necessary". See App. A, pp. 23-24.

According to the Circuit Court, Title VII requires that any mental or physical qualification having adverse impact on any race or sex group must be subjected to the ultimate validation research study—one which meets the EEOC guidelines (29 C.F.R. §1607 *et seq.*) or the "[much heavier] burden of justification" which an employer must meet if it does not comply with those guidelines. App. A, p. 21. Finally, if any lesser qualified individual hired for the purpose of research managed to do an acceptable job during the experiment mandated by the Circuit Court's decision, that single person's success presumably would mean that the employer's standard was not "necessary".

Although the issues of the City's selection standard were remanded for trial, the Circuit Court's legal standards appear to signal the deathknell of this action, and, if it remains the law, will limit or eliminate per-

sonnel testing in the Ninth Circuit. First, the Circuit Court's requirement that the City must hire, train, and use shorter and weaker Police Officers to prove the "necessity" of its standards is a practical and legal impossibility for a municipality; particularly when the only evidence before the City demonstrates that Police Officers who do not meet the City's standards would be more likely to use a higher degree of force against citizens and would be less likely to perform the tasks of the job. That requirement also outlaws the commonly accepted professional method of conducting validation "concurrently", or with existing employees. See B.R. 2015-16. *See, also, Firefighters Institute, Etc. v. City of St. Louis,* 549 F.2d 506, 510-11 (8th Cir. 1977) *certiorari denied,* 434 U.S. 819 (1977).

Second, the Circuit Court's insistence on a "necessity" standard for proving the lawfulness of a personnel test is at odds with the nature of testing itself. A personnel test never indicates a magic level which distinguishes candidates who can perform the job from those who cannot. Rather, a job related test "increases the *probability* that persons selected will perform well." B.R. 2017. Because exceptional individuals may perform a job after failing a test, it is generally impossible to prove that the use of a personnel test in an individual hiring decision is "necessary".

Third, the Circuit Court has elevated the technical provisions of the EEOC guidelines to legal standards which cannot be met by employers, and has ignored uncontradicted evidence that the application of such guidelines as absolute standards is professionally improper. B.R. 2012-13. The impropriety of such a use of those guidelines is corroborated by an internal Justice Department memorandum written by the long-time head

of the Civil Rights Division's Employment Section, David L. Rose. It states,

> [T]he thrust of the present guidelines is to place almost all test users in a posture of non-compliance; to give great discretion to enforcement personnel to determine who should be prosecuted; and to set aside objective selection procedures in favor of numerical hiring.[16]

Thus, *Blake, United States v. City,* and Mr. Rose's comments demonstrate that, even with expensive validation evidence,[17] an employer stands to lose federal funding, attorney fee awards, and enormous back pay awards[18] to broad classes of plaintiffs as the result of any litigation involving employment qualifications which have had any adverse impact against any racial or sex group.

B. The Ninth Circuit's Decision Conflicts With the State of the Law in This Court and in the Second, Fifth, Seventh, Eighth, and Tenth Circuits.

As noted earlier, the City submitted extensive validation studies in support of its motion for summary judgment, although it contended that such evidence was not legally required. The Circuit Court rejected that contention, and held that only one form of evi-

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[16]D. Rose, "Memorandum for the Deputy Attorney General Re: Selection Guidelines" (April 12, 1976) (received in discovery (See U.S. R. 183-84) and previously published in BNA's *Daily Labor Report,* No. 121, pp. AA-2 et seq. (June 22, 1976).)

[17]The City's studies cost over $96,000 in consultants' fees, in addition to the cost of the personnel to participate in the various studies. See B.R. 4084.

[18]A Los Angeles newspaper has quoted a Plaintiffs' attorney as stating that the City "could owe $20 million in back pay for the women alone, and 'at least that much again' to minority candidates if the Justice Department wins its suit." Sullivan, "LAPD Bias Suits Risk Millions", Los Angeles *Herald Examiner* (May 23, 1979) at page 1.

dence, a validation research study, may prove the lawfulness of a personnel test. That holding conflicts with decisions of this Court and decisions of at least five other Circuits.

For example, last term the Supreme Court used the employment exclusion of individuals being treated with methadone as "job related" without any discussion of formal validation evidence. *New York City Transit Authority v. Beazer*, ... U.S. ...., 99 S.Ct. 1355, 1366 (1979). Earlier, in *Washington v. Davis*, 426 U.S. 229, 251 (1976), this Court held that the "much more sensible construction of the job-relatedness requirement" mandated the lawfulness of a written test which predicted performance in training, without any showing that such a written test was "necessary". *Id.* The *Blake* decision also appears to contravene *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 427 (1975) which stated that the "question of job relatedness must be viewed in the context of the plant's operation and the history of the testing program." *Id.*

In holding that an employer can meet its burden (after a prima facie case has been demonstrated) only by formal validation studies meeting certain legal standards, the Ninth Circuit is in a direct conflict with decisions of the Second, Fifth, Seventh, Eighth and Tenth Circuits. Courts in each of those circuits have approved the use of evidence probative of the job relatedness of a personnel standard, other than formal validation studies, to prove the lawfulness of the selection device.[19]

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[19]See *Spurlock v. United Airlines, Inc.* 475 F.2d 216, 219 (10th Cir. 1972) ("[W]hen the job clearly requires a high degree of skill and the economic human risks involved in hiring an unqualified applicant are great, the employer bears a correspondingly lighter burden to show that his employment criteria are job-related"); *Boyd v. Ozark Air Lines, Inc.*, 568 F.2d 50, 54 (8th Cir. 1977) (adopting the *Spurlock* standard); *Vulcan Society of N.Y. City Fire Dept., Inc. v. Civil Service Commission*, 490 F.2d 387, 396 (2d Cir. 1973) (constitutional case treated under a Title VII standard in which the Court held that evidence of careful preparation of a personnel test would be relevant to a showing of job relatedness); *Yuhas v. Libbey-Owens-Ford Co.*, 562 F.2d 496 (7th Cir. 1977), certiorari denied, 435 U.S. 934 (1978) (no-spouse rule having adverse impact on women accepted as rationally related to job); and *Smith v. Olin Chemical Corp.*, 555 F.2d 1283 (5th Cir. 1977) (physical qualification having adverse impact on Blacks accepted as rationally related to job).

The legal standards used by the Circuit Court in evaluating the City's studies also present a direct conflict with a recent decision of a three judge panel, affirmed by the Supreme Court, which depended upon "professional standards" to evaluate an employer's validation evidence. *United States v. State of South Carolina*, 445 F.Supp. 1094 (D.S.C. 1977), *affirmed*, 434 U.S. 1026 (1978). That three judge panel accepted certain validation evidence despite the Plaintiff's argument pertaining to alleged methodological deficiencies, because that plaintiff (like the Plaintiffs in the instant case) had failed to prove any actual harm to the usefulness of the study as the result of those imagined deficiencies. *United States v. State of South Carolina, supra*, 445 F.Supp. at 1114. The *Blake* decision specifically rejected that balanced approach to an employer's burden, holding that it had been "amply refuted by existing case law." App. A, p. 25.

In addition to the direct conflicts discussed above, the Circuit Court's reasoning is also at variance with reasoning of other courts. Essentially, the Circuit Court rejects rational evidence of job relatedness as a matter of law, and insists that an employer "verify empirically"

facts which had been demonstrated by competent evidence. App. A, p. 22. That reasoning conflicts with the reasoning of this Court in *Washington v. Davis, supra,* 426 U.S. at 247 n. 13, and with the reasoning of the California Supreme Court in *Hardy v. Stumpf,* 21 Cal.3d 1, 9-11 (1978) (physical ability test for the Oakland Police Department upheld based upon rational evidence or "content validity"). Therefore, although the Ninth Circuit has remanded this case for further proceedings in the District Court, there will be great confusion as to the state of the law unless this Court grants the requested Writ to review the legal standards pertaining to an employer's burden in producing evidence of job relatedness.

III

The Shifting of the Burden of Proof to a Governmental Employer Requires Clarification Because of Unresolved Questions of Constitutional and Title VII Interpretation.

Another problem raised by the Circuit Court's decision is its holding that a finding of adverse impact relating to a selection device shifts the burden of proof to an employer, even when the employer's rebuttal evidence demonstrates that such adverse impact is not probative of intentional discrimination. App. A, p. 11. The District Court had rejected that "strict liability" approach and had refused to shift the burden of proof, because any inference of discrimination arising from the adverse impact of the City's height requirement and physical abilities test had been rebutted by the City's evidence that women were, as a class, relatively weaker and in poorer physical condition than men. App. B, p. 54.

In reversing the District Court, the Circuit Court interpreted *Griggs v. Duke Power Co.,* 401 U.S. 424 (1971) to require a shift in the burden of proof on a mere statistical showing regardless of whether those statistics are probative of intentional discrimination.[20] However, in *Griggs,* the statistics relied upon by the Court to shift the burden of proof were probative of purposeful discrimination, because there was no legitimate reason that Blacks and Caucasians should not be presumed to be equally qualified for a coal handler classification.

Moreover, this Court has never held that adverse impact shifts the burden of proof in the face of rebuttal evidence showing that such impact cannot give rise to an inference of intentional discrimination. Indeed, in *Teamsters v. United States,* 431 U.S. 324, 340 (1977) this Court provided that "like any other kind of evidence, [statistics] may be rebutted. In short, their usefulness depends on all of the surrounding facts and circumstances." *Id.* Further, in *Los Angeles Dept. of Water & Power v. Manhart,* 435 U.S. 702, 710-11 n. 20 (1978), the Court recognized that

> Even a completely neutral practice will inevitably have *some* disproportionate impact on one group or another. *Griggs* does not imply, and this Court has never held, that discrimination must always be inferred from such consequences. [*Id.*] [Emphasis in original.]

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[20]The Circuit Court based its interpretation on *Dothard v. Rawlinson,* 433 U.S. 321, 329 (1977). App. A, p. 11. In *Dothard,* however, the employer apparently offered no rational basis for the selection criteria being utilized, nor any statistical rebuttal to the plaintiff's prima facie case.

In *Blake,* however, the Ninth Circuit refused, as a matter of law, to permit rebuttal of a *prima facie* case where the plaintiff has submitted evidence of disproportionate impact of a selection instrument.

Where the employer is a state or local government entity, the Circuit Court's theory of strict liability for adverse impact against any racial or sex group appears to create a constitutional conflict. See App. B, pp. 50-52. After *National League of Cities v. Usery, supra,* 426 U.S. 833, it is apparent that Title VII was extended to governmental entities solely on the basis of the Fourteenth Amendment. As a result of *Washington v. Davis, supra,* 426 U.S. at 238-48, discrimination suits brought pursuant to constitutional claims require evidence of purposeful discrimination. However, if Congress, in extending Title VII to state and local governments, adopted the *prima facie* standard used by the Circuit Court, that extension conflicts with the Tenth Amendment.

This case provides an opportunity for this Court to clarify the standard for a *prima facie* case against a governmental entity. On two occasions during the last two years, the litigants before this Court have attempted to raise similar constitutional issues. See *Hazelwood School District v. United States,* 433 U.S. 299, 306 n. 12 (1977); *Dothard v. Rawlinson,* 433 U.S. 321, 323 n. 1 (1977). Clearly, there is national interest in resolving the constitutionality of a rule of law which provides for a shifting of burden of proof against a governmental entity on the basis of statistics which are not probative of intentional discrimination.

Thus, this Court should grant the Writ to clarify an employer's opportunity to rebut a *prima facie* case

when the statistics relate to a personnel test. Alternatively, the Court is urged to hold that the strict liability interpretation of *Griggs* may not constitutionally extend to governmental entities.

IV

The Circuit Court's Grant of Summary Judgment on Appeal on the Issue of the Former Use of "Policeman" and "Policewoman" Classifications Is Erroneous as a Matter of Law and Jeopardizes Good Faith Modifications of Personnel Systems by Employers.

The City also asks this Court to review the granting of summary judgment upon appeal (without a formal motion by the Plaintiffs) on the issues pertaining to the City's former use of the "Policeman" and "Policewoman" classifications. The Circuit Court reasoned that appropriate legal tests for equal protection (prior to the implementation of Title VII) or business necessity (after Title VII) could not be met because women could have served in a single general classification of "Police Officer" prior to the creation of the classification in July of 1973. See App. A, p. 35.

In its discussion of the District Court's use of the "business necessity" rationale to justify the transition period between the implementation of Title VII and the development of a single "Police Officer" classification, the Circuit Court reasoned that

> the very fact that the Department has successfully functioned since the dual classification system was abolished suggests that the old system was not required by compelling business purposes. [App. A, p. 15.]

Thus, under the Circuit Court's reasoning, an employer's voluntary change to a system which expands employment opportunity for individuals establishes as a matter of law that the earlier practice was unlawful. Such reasoning contradicts the principles of Title VII, which emphasizes the importance of conciliation and voluntary compliance by employers. See §706(b) of Title VII, 42 U.S.C. §2000e-5(b).

Further, the Circuit Court's summary judgment against the City's previous use of dual classifications of "Policeman" and "Policewoman" on an equal protection theory should be reviewed in light of this Court's application of Title VII in *Dothard v. Rawlinson, supra,* 433 U.S. 321. In that case, this Court applied Title VII's bona fide occupational qualification exception, a legal standard more stringent than that imposed by the Constitution, to justify gender based assignment of prison guards. In *Blake,* however, the Circuit Court applied the lesser constitutional burden to find that such classifications are unlawful unless there are virtually no alternatives (*i.e.,* "accurate proxies") to the gender based classification system. App. A, p. 35.

Thus, in granting summary judgment to the Plaintiffs, the Circuit Court failed to apply the appropriate constitutional standard as established in *Craig v. Boren,* 429 U.S. 190, 197 (1976). That case, relied upon by the District Court, held that gender based classifications serving important governmental objectives are constitutional if they are "substantially related to the achievement of those objectives." *Id.* The City clearly met that lesser burden, in light of its uncontradicted evidence

of the relationship of gender to physical size, strength, and agility needed to perform police tasks.[21]

During the past term, this Court opined that the principle underlying decisions such as the *Craig* case is "that a State is not free to make overbroad generalizations based on sex which are entirely unrelated to any differences between men and women or which demean the ability or social status of the affected class." *Parham v. Hughes,* ..... U.S. ....., 99 S.Ct. 1742, 60 L.Ed. 2d 269, 276 (1979). Applying that concept to this case, the dual police classifications cannot be said to have been an unconstitutional "administrative convenience".[22] Rather, those classifications were the result of the fact that men and women simply are not "similarly situated" with respect to the

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[21]Indeed, the Plaintiffs' own evidence corroborated that submitted by the City. In the deposition of Dr. George Henry McGlynn (filed November 10, 1976), he testified to a number of physiological differences between the sexes. For example, women have more fatty tissue than men, and that increased mass of non-functional tissue means that men have "more energy in [their] muscle cells." *Id.* at 11. The additional body fat carried by a woman "acts as an additional hindrance . . . upon her cardiovascular system . . .," and is "the same as a male carrying around an extra 15 or 20 pounds." *Id.*

Further, women are at a "disadvantage . . . in activities requiring running" due to the female body structure (*id.* at 13), and have only "about two-thirds the maximum absolute strength than men do." *Id.* at 12. When compared to males, women have "poor upper body strength." *Id.* at 14. Women are "at a disadvantage as to vigorous activities" due to a "reduced lactic acid output", and have a "reduced oxygen carrying ability" caused by having "less hemoglobin per millimeter of blood." *Id.* at 12.

[22]The evidence before the Circuit Court also demonstrated that the dual classification system did not demean women. Policemen and Policewomen were always paid at the same rate. B.R. 2205-06. Although women did not have a promotional classification beyond "Policewoman Sergeant", there has been no significant difference in the retirement pensions between men and women. B.R. 2291-95.

ability to perform the physical rigors of police work in Los Angeles. See n. 21, *supra,* at p. 29. Further, because of those physiological differences, the City's continuation of the "Policeman" and "Policewoman" classifications for a transition period following the extension of Title VII to municipalities was reasonable,[23] and did not violate Title VII.

V

Standards for the Granting of a Preliminary Injunction Enjoining the Termination of Federal Funds Should Be Established by This Court.

Increasingly, employment discrimination cases against governmental entities involve the threat of termination of federal funds. In the instant case, a termination of LEAA funds was enjoined by this District Court after the City had submitted uncontradicted evidence that termination of federal funds would disrupt a program of juvenile gang control which primarily impacted minority communities. Because the Government's suit was filed a mere 20 days after the District Court's granting of summary judgment to the City in *Blake,* that court determined that a stay of the Government's action pending appeals in *Blake* was necessary so that the court could be guided by the ultimate resolution

[23]Had the City failed to properly prepare for the introduction of women to patrol duties, the result may not have been successful. For example, in the early 1970's, the military services assigned women to physically demanding jobs without developing specific physical standards. The General Accounting Office later reported that a large number of women had been assigned to jobs which they physically were not able to perform. M. Binkin & S. Bach, *Women and the Military* (The Brookings Institution, 1977) at 80-81.

of that case in its control of discovery in the Government's action. App. D, pp. 69-70. The preliminary injunction was necessary to maintain the City's gang control program during the pendency of the stay.

The preliminary injunction enjoining the termination of LEAA funds is authorized by §518(c)(2)(E) of the Omnibus Crime Control and Safe Streets Act of 1968, as amended. See 42 U.S.C. §3766(c)(2)(E), *infra,* at pp. 77-78. Further, the injunction granted by the District Court was appropriate in light of that court's power to control its own calendar. See *Landis v. North American Co.,* 299 U.S. 248, 254 (1936). The Circuit Court, in reversing that preliminary injunction, has undermined the District Court's power "to control the disposition of the causes on its docket with economy of time and effort for itself, for counsel, and for litigants." *Id.*

The injunction also could have been justified on the basis of §518(b) of the Omnibus Crime Control and Safe Streets Act of 1968. That provision proscribes the conditioning of any LEAA grant on the adoption of a "percentage ratio, quota system, or other program to achieve racial balance". The affidavits submitted to the District Court, and the subsequent admission of Assistant Attorney General Drew Days, III, demonstrate that the Los Angeles Police Department was sued by the Justice Department because of its failure to adopt hiring goals or quotas for women and minorities. In the City's view, the District Court was obligated under the provisions of the Act to enjoin any termina-

tion of funds. The Circuit Court, however, rejected that argument. See App. C, pp. 64-66.

The Court is urged to review this issue to establish whether the Justice Department's practice of insisting upon racial goals or quotas, and threatening termination of federal funds if those quotas are not adopted, is consistent with the Omnibus Crime Control and Safe Streets Act of 1968. Further, to the extent that the Government actually files suits based on that statute, the statute should be interpreted to permit a District Court the authority to enjoin a fund termination when such a termination would be an unjustifiable hardship on a community, or when an injunction is required to maintain the status quo during a stay of proceedings.

Conclusion.

The decisions rendered by the Circuit Court in these cases are critical to local governments and law enforcement agencies throughout the country. The City urges this Court to grant the Writ to bring consistency to an area of law fraught with inconsistent interpretations; interpretations which have a direct impact on important governmental policies.

A hearing on the merits of this case also would have an important benefit to the litigants. This case was filed nearly six years ago, and a denial of the hearing by this Court probably will delay final resolution of the issues in this case by this Court for several years. On the other hand, the Court's granting of the Writ to resolve the important issues of law in this case would be consistent with the congressional policy to expedite Title VII cases. §707(b) of Title VII, 42 U.S.C. §2000e-5(f)(5).

For all the foregoing reasons, the City prays that a Writ of Certiorari issue to review the judgment and decisions of the United States Court of Appeals for the Ninth Circuit in these cases.

Respectfully submitted,

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APPENDIX A.

Opinion.

United States Court of Appeals, for the Ninth Circuit.

Fanchon Blake, et al., Plaintiffs-Appellants, v. City of Los Angeles, et al., Defendants-Appellees. No. 77-3595, No. 77-3601.

Appeal from the United States District Court for the Central District of California.

Filed: May 2, 1979.

Before: HUFSTEDLER and TANG, Circuit Judges, and SOLOMON,* District Judge.

HUFSTEDLER, Circuit Judge:

Appellants brought this class action charging the City of Los Angeles, the Los Angeles Board of Civil Service Commissioners, and Edward M. Davis, then Chief of Police of the Los Angeles Police Department, with sex discrimination in employment in the Los Angeles Police Department ("LAPD"). The appellants represent a class of women who are past, present, and future applicants for, employees in, and retirees from sworn positions in the LAPD. Appellants claimed violations of Title VII of the Civil Rights Act of 1964, as amended (42 U.S.C. §§ 2000e *et seq.*), the Fourteenth Amendment of the United States Constitution, and the Civil Rights Act of 1871 (42 U.S.C. § 1983). After certifying the class, the district court granted summary judgment to the appellees. Appellants appeal from the summary judgment, and the City cross-appeals from the class certification order.

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*Honorable Gus J. Solomon, Senior United States District Judge, District of Oregon, sitting by designation.

We reverse the summary judgment and hold that (1) appellants met their burden of proving a prima facie case that the appellees violated Title VII before July 1, 1973, by maintaining sex-segregated job classifications, and after July 1, 1973, by using selection devices, including a height requirement and a physical abilities test that disproportionately excluded women from employment, (2) appellees' use of sex-segregated job classifications between March 24, 1972, and July 1, 1973, violated Title VII because it was not mandated by business necessity, (3) appellees were not entitled to summary judgment with respect to employment practices used after July 1, 1973, because they failed to show that the questioned employment practices were justified as a matter of law under the required standards for business necessity, (4) the gender-based classification system used by appellees before Title VII became applicable to governmental agencies violated the equal protection clause of the Fourteenth Amendment. Because we reverse and remand the case to the district court or trial, we decline to reach the merits of the class certification order.

FACTUAL BACKGROUND

Prior to July 1, 1973, the LAPD maintained separate, gender-based job classifications in entry-level police positions. Men in the "policeman" classification performed general police patrol assignments and could be promoted through all ranks of the department. Women in the "policewoman" classification generally performed "tasks relating to women and children, desk duty, and administration." Policewomen were barred from regular police patrol assignments and were ineligible for promotion above the level of sergeant. Between 1970 and

1973 no women were appointed to sworn positions in the LAPD, although the department hired more than 2,000 men. The percentage of women in sworn positions in the LAPD declined from 2.62 percent in 1970 to 2.15 percent in 1973.

Beginning on July 1, 1973, the LAPD abandoned the sex-segregated job classifications and established a single entry-level position of "police officer" for both men and women. The department unified its lines of promotion and imposed identical entry requirements on both male and female applicants for "police officer" positions, "Police officers" initially were required to be at least 5′ 7″ in height; this requirement subsequently was lowered to 5′ 6″ where it remains today. The department also instituted a physical abilities test, which all applicants for "police officer" positions were required to pass. In 1976, three years after the "unisex" job classification program had been established, women occupied only 2.08 percent of all sworn positions in the LAPD and only 0.48 percent of all positions in the ranks of sergeant and above.

The district court found that appellants' sex discrimination claims spanned three time periods of distinct legal significance. The first period antedated March 24, 1972, when Title VII became applicable to governmental agencies. The district court held that the dual classification system in effect during this period did not violate the equal protection clause of the Fourteenth Amendment because it was "substantially related to and serve[d] . . . the important governmental objective of providing an effective police force." (*Blake v. City of Los Angeles* (C.D. Cal. 1977) 435 F. Supp. 55, 61.

The second period was between March 24, 1972, and July 1, 1973, the date when the LAPD abolished the sex-segregated job classification system. The district court held that the dual classification system did not violate Title VII during this period because its continuation was justified by "business necessity". The dual classification system was found not to be a violation of the Fourteenth Amendment for reasons mentioned above.

The final period was the time after July 1, 1973, the date when the unisex "police officer" classification was instituted. The district court held that "undisputed facts" established that the entry requirements for police positions, including the height requirement and the physical abilities test, violated neither the Fourteenth Amendment nor Title VII. Appellants' Fourteenth Amendment claim was rejected because the district court found no evidence of discriminatory intent. The district court held that discriminatory intent also must be proved to establish a Title VII violation by an agency of local government. Thus appellants' Title VII claim was rejected, although the district court concluded that the LAPD's height requirement and physical abilities test "imposed a severe adverse impact upon women," (*Blake v. City of Los Angeles, supra,* 435 F. Supp. 55, 62.) The district court held, alternatively, that no Title VII violation could be shown even under the impact standard of *Griggs v. Duke Power Co.* (1971) 401 U.S. 424, because the height requirement and physical abilities test "are appropriate for the selection of qualified applicants" as a matter of law. (*Blake v. City of Los Angeles, supra,* 435 F. Supp. at 66.)

I

TITLE VII CLAIMS

Appellants contended that the LAPD violated Title VII before July 1, 1973, by maintaining sex-segregated job classifications, and after July 1, 1973, by using selection devices, including a height requirement and physical abilities test, that disproportionately exclude women from employment.[1] A three-part inquiry is required to decide whether Title VII has been violated. (*Dothard v. Rawlinson* (1977) 433 U.S. 321, 329; *Albemarle Paper Co. v. Moody* (1975) 422 U.S. 405, 425; *DeLaurier v. San Diego Unified School District* (9th Cir. 1978) 558 F.2d 674, 676.) The first question is whether plaintiffs have established a prima facie case of employment discrimination. (*Dothard v. Rawlinson, supra,* 433 U.S. at 329.) If a *prima facie* case has been shown, the burden then shifts to the employer to justify the employment practice in question. (*Griggs v. Duke Power Co., supra,* 401 U.S. at 432.) If the employer meets his burden of justification, plaintiffs may then show that alternative selection devices exist that would serve the employer's legitimate interests without discriminatory effects. (*Albemarle Paper Co. v. Moody, supra,* 422 U.S. at 425.)

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[1]Title VII provides in pertinent part: "(a) It shall be an unlawful employment practice for an employer—(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin." (42 U.S.C. § 2000e-2(a).)

Prima Facie Case of Discrimination

Although the district court recognized that, under *Griggs v. Duke Power Co., supra,* a prima facie Title VII violation can be established by "the mere showing of a disproportionate impact" of an employment practice on a group protected by Title VII (*Blake v. City of Los Angeles, supra,* 435 F. Supp. at 63), the court held that the *Griggs* impact standard could not constitutionally be applied to agencies of state and local government. Relying on *Scott v. City of Anniston* (N.D. Ala. 1977) 430 F. Supp. 508, the district court reasoned that Congress had no constitutional power to impose on state and local governments anti-discrimination standards greater than those compelled by the equal protection clause of the Fourteenth Amendment. Because the Supreme Court in *Washington v. Davis* (1976) 426 U.S. 229, held that proof of discriminatory purpose was needed to establish a violation of the equal protection clause, the same standard must be engrafted on Title VII in actions against state and local governments. The premise of the argument is that "it is simple logic that a statute can be no broader than its Constitutional base." (430 F. Supp. at 515.) The premise is wrong because it misconceives controlling authority interpreting both the Fourteenth Amendment and Title VII.

In *Katzenbach v. Morgan* (1966) 384 U.S. 641, the Supreme Court held that Congress' power under Section 5 of the Fourteenth Amendment to enforce that amendment by "appropriate legislation" is not limited to prohibiting state action that itself violates the Constitution. *Katzenbach* upheld the constitutionality of Section 4(e) of the Voting Rights Act of 1965, prohibiting certain uses of a literacy test to determine

voter qualifications. Although the Supreme Court previously held that use of literacy tests to determine voter qualification did not violate the Fourteenth Amendment (*Lassiter v. Northampton County Board of Elections* (1959) 360 U.S. 45), *Katzenbach* held that Congress could determine that legislation banning use of literacy tests was "appropriate" to enforce the Fourteenth Amendment. In upholding congressional determinations of the efficacy of imposing bans on the use of such tests to implement the Fourteenth Amendment, the Supreme Court observed that "[i]t is enough that we may be able to perceive a basis" for the legislation. (384 U.S. at 653.)

The 1972 amendments extending the coverage of Title VII to state and local governments were enacted by Congress pursuant to Section 5 of the Fourteenth Amendment.[2] (*Fitzpatrick v. Bitzer* (1976) 427 U.S. 445, 453 & n.9.) In enacting this legislation, Congress clearly intended to apply the *Griggs* "impact" standard to state and local governments. As the Supreme Court said in *Dothard v. Rawlinson* (1977) 433 U.S. 321, 332 n.14: "Congress expressly indicated the intent that the same Title VII principles be applied to governmental and private employers alike. See H.R. Rep. No. 92-238, p. 17 (1971); S. Rep. No. 92-415, p. 10 (1971)." In reviewing the constitutionality of Congress' extension of the *Griggs* impact standard to state and local governments, we need only consider whether the 1972 amendments to Title VII were "appropriate legislation" to enforce the equal protection clause of the Fourteenth Amendment. (*Katzenbach v. Morgan, su-*

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[2]Section 5 of the Fourteenth Amendment provides: "The Congress shall have power to enforce, by appropriate legislation, the provisions of this article."

pra, 384 U.S. at 651.) The 1972 amendments are appropriate legislation to enforce the equal protection clause if they are " 'plainly adapted to that end' and . . . not prohibited by but . . . consistent with 'the letter and spirit of the constitution.' " (*Katzenbach v. Morgan, supra,* 384 U.S. at 651 (*quoting McCulloch v. Maryland* (1819 4 Wheat. 316,421).)

Congress enacted the 1972 amendments to Title VII after taking notice of findings "that widespread discrimination against minorities exists in State and local government employment." (H.R. Rep. 92-238, 1972 U.S. Code Cong. & Ad. News 2137, 2152.) It was plainly within Congress' authority to determine that implementation of the equal protection clause required extension of the *Griggs* impact standard to state and local governments. (*See Katzenbach v. Morgan, supra,* 384 U.S. at 653.) The means chosen by Congress are rationally related to the goal of enforcing the equal protection clause's prohibition of discrimination. The 1972 amendments are consistent with the letter and spirit of the Constitution. Because Congress acted pursuant to Section 5 of the Fourteenth Amendment, the Tenth Amendment does not foreclose application of the *Griggs* impact standard to state and local governments (*cf. Fitzpatrick v. Bitzer, supra* (Eleventh Amendment does not bar congressional provision for awards of backpay and attorneys' fees in Title VII actions against state)), regardless of any limitations it may impose on Congress' Commerce Clause powers (*see National League of Cities v. Usery* (1976) 426 U.S. 833).

We agree with the Seventh Circuit that "since the 1972 Amendments are clearly rationally related to and consistent with 'the letter and spirit' of the Fourteenth

Amendment, and the means chosen were not in themselves unconstitutional, . . . Congress could constitutionally incorporate the *Griggs* test into the 1972 Amendments." (*United States v. City of Chicago* (7th Cir. 1978) 573 F.2d 416, 423-24.) We therefore hold that Title VII applies the *Griggs* impact standard to both public and private employers alike, as numerous courts have recognized. (*United States v. City of Chicago, supra; United States v. Virginia* (E.D. Va. 1978) 454 F. Supp. 1077, 1084, *overruling Friend v. Leidinger* (E.D. Va. 1977) 446 F. Supp. 361, 384-87; *Harrington v. Vandalia-Butler Board of Education* (S.D. Ohio 1976) 418 F. Supp. 603, 607; *see also United States v. City of Buffalo* (W.D. N.Y. 1978) 457 F. Supp. 612; *League of United Latin American Citizens v. City of Santa Ana* (C.D. Cal. 1976) 410 F. Supp. 873; *Officers for Justice v. Civil Service Commission of San Francisco* (N.D. Cal. 1975) 395 F. Supp. 378.) The district court erred in holding that appellants were required to present evidence of discriminatory intent to defeat the City's motion for summary judgment.

The district court concluded that even if the *Griggs* impact standard was applied, appellees would still be entitled to summary judgment. This conclusion was based in part on the district court's holdings that continuation of gender-based job classifications and use of the physical abilities test and height requirement were justified by "business necessity" (issues we discuss *infra*). But the district court also concluded that appellants' evidence about the impact of the post-1973 selection standards would be insufficient to establish a prima facie case of sex discrimination even under the *Griggs* standard.

The City does not claim that appellants failed to show a prima facie case of discrimination under the *Griggs* standard for the gender-based job classifications in effect before July 1, 1973. The district court recognized that appellees "do not claim that the dual classification system for Policemen and Policewomen in effect during this period would comply with the requirements of Title VII." (*Blake v. City of Los Angeles, supra,* 435 F. Supp. at 61.) The undisputed total exclusion of women from regular police patrol work and positions above the level of sergeant unmistakably established a prima facie case of sex discrimination. Thus, the burden shifted to appellees to justify use of these practices after March 24, 1972.[3]

The undisputed evidence revealed that the 5′ 6″ height requirement excluded 87 percent of all women, but only 20 percent of all men between the ages of 18 and 79. The 5′ 7″ requirement excluded 95 percent of all women, but only 32 percent of all men. (*See also* Note, "Height Standards in Police Employment and the Question of Sex Discrimination," 47 S.Cal. L.Rev. 585, 588 n.13.) The physical abilities test excluded half of all women who took it, but only 2.6 percent of all men who took the test. Although the district court recognized that the height requirement and the physical test had a severe adverse impact on women (435 F. Supp. at 62), it nevertheless concluded that appellants had failed to show a prima facie case of discrimination arising from the use of either or both of these qualifications.

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[3]The question whether defendants met their burden of justification with respect to the gender-based job classification is discussed at pp. 12-14, *infra.*

Despite the court's recognition that most disparities of this kind based upon statistical comparisons "often give rise to an inference of racial discrimination," the court concluded that "the same inference does not necessarily follow when a claim of sexual discrimination is asserted." The district court did not explain why gross disparities established through statistical comparisons are probative of racial discrimination, but not similarly probative of sexual discrimination. However, the district court did not have the benefit of *Dothard v. Rawlinson* (1977) 433 U.S. 321, which reached the opposite conclusion. *Dothard,* decided six weeks after *Blake,* held that a prima facie case of sex discrimination was established from national census statistics showing that a 5′ 2″ height requirement disproportionately excluded women from positions as Alabama Correctional Counselors. *Dothard* leaves no doubt that a showing of disproportionate impact is all that is required to establish a prima facie case of discrimination whether it be racial or sexual discrimination. "[T]o establish a prima facie case of discrimination, a plaintiff need only show that the facially neutral standards in question select applicants for hire in a significantly discriminatory pattern." (433 U.S. at 329.) No inference of discriminatory purpose need be drawn for the statistics to establish prima facie discrimination, because discriminatory intent need not be shown in Title VII actions. (*United States v. City of Chicago, supra,* 573 F.2d 416.)

The conclusion follows that appellants established a prima facie case of sex discrimination by establishing a disproportionate impact by statistical methods indistinguishable from those in *Dothard.* Thus, the burden shifted to appellees to justify use of the challenged

selection devices. (*See, e.g., United States v. City of Buffalo* (W.D. N.Y. 1978) 457 F. Supp. 612, 622, 625 (disproportionate impact of written test and height requirements establishes prima facie case of discrimination); *Officers for Justice, supra,* 395 F. Supp. 378, 380, 382 (disproportionate impact of height requirement and physical test established prima facie case of discrimination).)

Appellees argued that the disproportionate exclusion of women was not as bad as it looked from the statistics because fewer women than men were interested in police work. The contention is not relevant. The challenged qualifications disproportionately excluded women who were interested enough to apply. Moreover, even if appellees had proved that women were less interested than men in police work, which they did not, the disinterest itself may be traceable to the Police Department's use of selection devices that would disproportionately exclude women. As the Supreme Court observed in *Dothard*: "The application process itself might not adequately reflect the actual potential applicant pool, since otherwise qualified people might be discouraged from applying because of a self-recognized inability to meet the very standards challenged as being discriminatory." (433 U.S. at 330.)[4]

[4]*See* Note, "Height Standards in Police Employment and the Question of Sex Discrimination," 47 S.Cal. L.Rev. 585, 598-99 (1974). Nothing this court said in United States v. Ironworkers Local 86 (9th Cir. 1971) 443 F.2d 544, supports appellees' notion that plaintiffs are required to go beyond a showing of disproportionate impact to establish a prima facie violation of Title VII. Our statement that the use of statistics "is conditioned by the existence of proper supportive facts" meant only that statistics should be used properly and should not be used to make inferences they do not support. Appellants here properly used statistics to establish the disproportionate impact of appellees' selection devices. They did not need to make any greater showing to establish a prima facie case of sex discrimination. As we stated in *Ironworkers:* "It is our belief that the often-cited aphorism, 'statistics often tell much and Courts listen,' has particular application in Title VII cases." (443 F.2d at 551 [footnote omitted].)

The fact that there are physical differences between males and females, including the fact that men, as a group, tend to be taller and physically stronger than women as a group, does not erode the prima facie inference of discrimination that flows from a showing of statistically disproportionate impact. "Similarly, the statistical disparity here between male and female performance on the physical agility test establishes the *prima facie* case of sex discrimination, with the burden shifting to the defendants to show that the selection device is job related. If defendants establish the court's satisfaction that the upper body strength which the test primarily measures is necessary to patrol work, they will prevail, not because the plaintiffs have not established the *prima facie* case, but because the necessity for proper job performance of the skills measured by the selection device permits use of the device despite its adverse impact. Defendants' argument errs in that it takes as given the precise fact that the law requires defendants to prove." (*Officers for Justice, supra,* 395 F. Supp. at 382 n.1.)

"Business Necessity" Defense

Because undisputed evidence before the district court established a prima facie case of sex discrimination, the burden shifted to defendants to show that "business necessity" justified their employment practices. (*'Griggs, supra,* 401 U.S. at 431.) As the *Dothard* Court explained: "[o]nce it is thus shown that the employment standards are discriminatory in effect, the employer

must meet 'the burden of showing that any given requirement [has] . . . a manifest relationship to the employment in question.' *Griggs v. Duke Power Co., supra,* at 432." (*Dothard, supra,* 433 U.S. at 329.) Administrative convenience is not a sufficient justification for the employer's practices. Rather, "a discriminatory employment practice must be shown to be necessary to safe and efficient job performance to survive a Title VII challenge." (*Dothard, supra,* 433 U.S. at 332 n. 14; *DeLaurier v. San Diego Unified School Dist.* (9th Cir. 1978) 588 F.2d 674, 678.)

Until July 1, 1973, the LAPD maintained sex-segregated job classifications that barred all women from police patrol work and prohibited women from being promoted above the level of sergeant. The district court recognized, and appellees conceded, that the dual classifications system did not comply with the requirements of Title VII. Yet the district court, citing *Robinson v. Lorillard Corp.* (4th Cir. 1971) 444 F.2d 791, held that continuation of the practice was justified by "business necessity." The district court reasoned that "the City made a good faith effort to comply with the Act, and that the time required to put the revised hiring practices into effect was not unreasonable under the circumstances." (*Blake, supra,* 435 F. Supp. at 61-62.)

The district court misapprehended the impact of *Robinson v. Lorillard Corp., supra,* 444 F.2d 798. The *Robinson* court had held that "[t]he test is whether there exists an overriding legitimate business purpose such that the practice is necessary to the safe and efficient operation of the business. Thus, the business purpose must be sufficiently compelling to override

any racial impact, the challenged practice must effectively carry out the business purpose it is alleged to serve; and there must be available no acceptable alternative policies or practices which would better accomplish the business purpose advanced, or accomplish it equally well with a lesser differential racial impact." (444 F.2d 79, 798 [footnotes omitted].) There was no evidence before the district court that the use of sex-segregated job classifications was necessary to the safe and efficient operation of the Los Angeles Police Department; moreover, there was abundant evidence that less discriminatory alternatives were available. Indeed, the very fact that the Department has successfully functioned since the dual classification system was abolished suggests that the old system was not required by compelling business purposes. (*Cf. Schick v. Bronstein* (S.D. N.Y. 1978) 447 F. Supp. 333 (height requirement does not serve an important governmental objective as department acknowledged by abolishing it); *Schaefer v. Tannian* (E.D. Mich. 1974) 394 F. Supp. 1128, *remanded on other grounds* (6th Cir. 1976) 538 F.2d 1234 (former practice restricting women to positions in Women's Division does not meet "business necessity" test).) No changed circumstances have been suggested that would justify the former prohibition of police patrol assignments for women in light of their subsequent successful performance on patrol. Thus, the LAPD's use of the dual classification system cannot be justified on the grounds of business necessity.

The district court attempted to justify a continuation of the dual classification system after March 24, 1972, on the ground that continuation of the discriminatory system was necessary to maintain a functioning police department during the transition period. The district

court's conclusion was based upon its prior erroneous conclusion that the earlier segregative system was justified on business necessity grounds and on the further assumption that a grace period should be implied similar to that accorded private employers when Title VII was first enacted in 1964. The inference properly to be drawn by Congress' express grant of a one-year grace period to private employers in 1964, and an omission to grant a similar grace period when public employers were added to Title VII in 1972, is that Congress deliberately withheld any grace period. The legislative history of the 1972 amendments to Title VII enforces our conclusion. "Legislation to implement this aspect of the Fourteenth Amendment is long overdue." (H. Rep. 92-238, 1972 U.S. Code Cong. & Ad. News 2137, 2154.) Nothing in the history suggests that Congress intended to permit public employers to delay compliance because immediate compliance with the law would be administratively inconvenient.

We conclude that the LAPD's use of sex-segregated job classifications prior to July 1, 1973, violated Title VII. Appellees completely failed to carry their burden of proving a business necessity to justify the Department's discriminatory system maintained in violation of Title VII.

We turn to the selection devices used by LAPD after July 1, 1973. Despite their exclusionary impact on women, the appellees sought to justify the Department's height requirement and physical abilities test as "job-related" measures of qualities important to successful performance of police tasks. The district court accepted the appellees' contentions and held that "[t]he undisputed facts before this court are such that the

court must conclude as a matter of law that the qualifying tests are appropriate for the selection of qualified applicants for the job in question." (435 F. Supp. at 66.) Accordingly, the district court granted summary judgment to the appellees despite the proved exclusionary impact on women of these qualifications in the period after July 1, 1973.

The district court's conclusions appear to be, once again, based upon a misunderstanding of the "business necessity" defense and of the relation of the concept of "job relatedness" to the business necessity defense. "Job relatedness" is relevant only for the purpose of trying to prove that the characteristics which the various tests select are directly related to the business necessity. The term "job related" generally is used to refer to the capacity of selection devices to measure traits that are important to successful job performance. The process of determining whether a selection device is sufficiently job related to comply with the requirements of Title VII has been referred to as "validation." It is not enough that the device selects characteristics that may have some rational relationship to job performance; "a discriminatory employment practice must be shown to be necessary to safe and efficient job performance to survive a Title VII challenge." (*Dothard, supra,* 433 U.S. at 332, n. 14.)

Because the "business necessity" defense is very narrow, it is not easy for employers to demonstrate the job relatedness of selection devices shown to be prima facie violations of Title VII. (*See Albemarle, supra,* 422 U.S. at 425-36.) An employer who tries to show job relatedness as a matter of law on a motion for summary judgment faces an even greater challenge.

Summary judgment, of course, is appropriate only if the evidence before the district court shows "that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." (Fed. R. Civ. P., Rule 56(c).) All of the intendments are against the party who is moving for summary judgment. (*Adickes v. Kress & Co.* (1970) 398 U.S. 144, 158-61; *United States v. Diebold, Inc.* (1962) 369 U.S. 654, 655; *Stansifer v. Chrysler Motors Corp.* (9th Cir. 1973) 487 F.2d 59, 63.) Meticulous review of the record convinces us that the appellees were not entitled to summary judgment because appellees failed to show that their selection devices were so job related as to be justified by business necessity.

The district court did not specify the legal standard it applied to determine that the LAPD's selection devices were "appropriate" as a matter of law. Yet it is apparent from the district court's opinion and the evidence in the record that proper Title VII standards were not applied. For example, the district court concluded that "[t]he situation here is similar to that in *Washington v. Davis, supra,* 426 U.S. at 245-46, where the Supreme Court stated that it was 'untenable' that a verbal abilities test for a police officer position was improper, even if it excluded a large number of Negroes." (435 F. Supp. at 66.) However, when the Supreme Court reached this conclusion in *Washington v. Davis,* it was applying the Constitution and *not* Title VII. (*Washington v. Davis, supra,* 426 U.S. at 245-46 ("it is untenable that the Constitution prevents the Government" from using a verbal abilities test).) The Supreme Court recognized that Title VII imposed a more stringent standard. "Under Title VII . . . it is an insufficient response to demonstrate some rational

basis for the challenged practices. It is necessary, in addition, that they be 'validated' in terms of job performance . . . . However this process proceeds, it involves a more probing judicial review of, and less deference to, the seemingly reasonable acts of administrators and executives than is appropriate under the Constitution . . . ." (*Washington v. Davis, supra,* 426 U.S. at 246-47.[5])

The degree of justification the district court required for the LAPD's selection devices fell far short of the "business necessity" required by Title VII. The district court stated that because the asserted relationship between the LAPD's selection devices and police duties was "obvious," a less-searching inquiry into their job relatedness was necessary. Noting that there is no single, appropriate method for validating employment tests, the district court held that "defendants need only supply competent and relevant evidence on this issue." The district court based its award of summary judgment on defense affidavits, which "for the most part, merely point out what is obvious and needs little proof." (435 F. Supp. at 65.) We disagree with the district court that, under Title VII, use of the selection devices could be justified in this manner.

To justify the use of pre-employment selection devices as a business necessity, an employer must show that the tests or requirements are so closely job related

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[5]The district court's erroneous application of the constitutional standard of Washington v. Davis apparently was the source of its conclusion that the LAPD's selection devices were "appropriate" as a matter of law. Selection devices that are insufficiently job related to comply with Title VII may be able to pass muster when the less stringent constitutional standard is applied. *See* Smith v. City of East Cleveland (N.D. Ohio 1973) 363 F. Supp. 1131, *rev'd in part, aff'd in part sub nom.* Smith v. Troyan (6th Cir. 1975) 520 F.2d 492.

that their use is "necessary to safe and efficient job performance." (*Dothard, supra,* 433 U.S. at 332 n.14.) Thus, the burden of demonstrating the job relatedness of selection devices cannot be easily satisfied. (*See Officers for Justice, supra,* 395 F. Supp. at 384 (the large exclusionary impact of certain selection devices requires "a very high degree of persuasion" for defendants to justify their use).) It is not a burden that can be carried by the assertion of an "obvious," but unmeasured, relationship between selection standards and qualities thought necessary for job performance. (*Dothard, supra,* 433 U.S. at 331.) Rather, it is essential that selection devices be "validated" by professionally-acceptable methods. (*Albemarle, supra,* 422 U.S. at 431; *see Washington v. Davis, supra,* 426 U.S. at 247 & n.13.)

In *Albemarle,* the Supreme Court explained the legal standard for determining the job relatedness of selection devices: "discriminatory tests are impermissible unless shown, by professionally acceptable methods, to be 'predictive of or significantly correlated with important elements of work behavior which comprise or are relevant to the job or jobs for which candidates are being evaluated.'" (422 U.S. at 431.) The validation process thus involves at least two distinct aspects. The employer first must determine what "important elements of work behavior" are. Then he must demonstrate that his selection devices are "predictive of or significantly correlated" with the elements of work behavior that have been identified as important.

Validation studies must employ professionally-acceptable methods to increase the likelihood of obtaining trustworthy results. Courts have recognized that a number of validation techniques are professionally accept-

able. (*See Washington v. Davis, supra,* 426 U.S. at 247 n.13 (describing three professional methods of validation).) The Equal Employment Opportunity Commission ("EEOC") has incorporated these techniques into guidelines that outline minimum standards for professional validation studies. (29 C.F.R. § 1607.) The Supreme Court has held that the EEOC guidelines are "entitled to great deference" from courts determining whether employment selection devices comply with Title VII. (*Griggs, supra,* 401 U.S. at 434. *See Washington v. Davis, supra,* 426 U.S. at 247 n.13; *Albemarle, supra,* 422 U.S. at 430-35.) Although compliance with the EEOC guidelines is not mandatory, an employer's burden of justification is much heavier if the guidelines have not been followed. (*United States v. City of Chicago, supra,* 573 F.2d at 427.)[6]

When the proper legal standard for determining business necessity under Title VII is applied to the evidence in the record, it is apparent that appellees were not entitled to summary judgment. Appellees failed to establish that the LAPD's selection devices were so closely job related that their use was justified by business necessity. At most, they showed that there was some rational relationship between their selection devices and certain elements of job performance by police. While this may have been sufficient to satisfy the district court's relaxed standard of review, it fell far short

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[6]The EEOC guidelines are designed to help employers determine whether their selection devices comply with Title VII. The reason that it is important to follow the EEOC guidelines is because they incorporate professional procedures for test validation that are thought to insure more reliable results. The fact that it may be difficult to professionally validate selection devices does not excuse non-compliance with professional procedures; rather, it suggests that employers should be more cautious in employing selection devices that have discriminatory impacts.

of demonstrating business necessity for the selection devices.

Appellees offered two general justifications for use of the height requirement. They argued that taller officers could more easily control resisting suspects with a minimum use of force and that taller officers had better capacities to observe field situations. They made no attempt to verify empirically the latter justification and the affidavits submitted in support of this theory were insufficient to warrant summary judgment on the issue. (*See United States v. City of Buffalo, supra,* 457 F. Supp. at 625-26; *United States v. Virginia, supra,* 454 F. Supp. at 1088 (opinion evidence that "height and weight are useful in police work" does not prove job relatedness, but rather only "a good faith belief of job-relatedness").)[7] To demonstrate business necessity under the former rationale, appellees would have to show: (1) that subduing suspects with a minimum use of force is an important element of job performance by police, and (2) that height is so significantly correlated with minimization of force in suspect control as to be necessary to safe and efficient job performance by police. Although the Police Departments job analysis indicated that control of resisting suspects occupies only a minor part of police duties, for present purposes we assume, *arguendo,* that it is permissible to require all police to be capable of sub-

[7]Shorter officers may have certain advantages in observing field situations (*e.g.,* the ability to look under objects, the ability to squeeze through narrow passageways) that taller officers lack. The City failed to demonstrate that the net advantages of height in observing field situations were sufficiently great to make the 5′ 6″ height requirement a business necessity.

duing suspects with a minimum use of force.[8] Even on these assumptions, appellees failed to demonstrate that the LAPD's height requirement is so significantly correlated with minimization of force as to make it a business necessity.

The City presented the results of two empirical studies in an effort to validate the height requirement. The first study attempted to correlate the height of police officers with resistance offered by suspects and force employed by officers. Based on questionnaires returned by arresting officers, the study concluded that while "[t]here is no relationship between officer height and suspect resistance, . . . [s]horter officers use strong force more often than do taller officers." The latter conclusion was based on the study's finding that "strong force" was used in 5 percent of all arrests by officers 5′ 8″ and 5′ 9″ in height, 4.5 percent of arrests by officers 6′ and 6′ 1″ in height, and 3.8 percent of arrests by police 6′ 2″ and taller. The second study, based on simulations of police subduing suspects, concluded that taller officers generally perform the bar-arm control hold better than shorter officers. Appellees argued that shorter officers would be forced to resort to stronger force more frequently than taller officers who could better perform the bar-arm control hold.

Appellants vigorously disputed both the methodology and the findings of these studies. The studies failed to show that persons shorter than 5′ 6″ (the level of the height requirement) would be more likely to

[8]*See* the discussion of the availability of less discriminatory alternatives, *infra* at 22. The City's job analysis concluded that an officer had to wrestle with a suspect only once every 20 watches and that an officer was kicked or hit by a subject once every 33 watches.

use strong force than taller persons, because no data was reported for persons shorter than 5′ 6″. Moreover, they noted that the studies failed to control for the effect of experience and job assignment. Appellants also argued that rater bias may have affected the results of the bar-arm control hold study and that neither study had attempted to differentially validate the effect of height by sex.

Appellants' attacks on the methodology of the studies are more than mere quibbles. Because neither of the studies included persons shorter than 5′ 6″, the studies are of little value in determining whether the height requriement excludes individuals who would be more likely to resort to strong force.[9] This criticism is particularly telling in light of appellants' allegation that unreported data in one of the studies showed that persons 5′ 7″ in height use strong force less frequently than persons between 5′ 8″ and 5′ 11″ in height. The lack of controls for experience may have systematically biased the studies' results because shorter officers may have been less experienced, given the previous reduction in the LAPD's height requirement.[10] The first study's ambiguous definition of "strong force" and the lack of controls for the level

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[9]The EEOC guidelines recognize that validation studies should include persons who are excluded by the selection standards in question. (*See* 29 C.F.R. § 1607.5.)

[10]The LAPD lowered its height requirement from 5′ 9″ to 5′ 8″ in 1954. Thus, all 20-year veterans on the force would be at least 5′ 9″ in height. If the shorter officers in the study had less job experience, the study's results may be the product of job experience and not height. (*See* Boston Chapter, NAACP, Inc. v. Beecher (1st Cir. 1974) 504 F.2d 1017, 1025; League of United Latin American Citizens, *supra,* 410 F. Supp. at 904; Officers for Justice, *supra,* 395 F. Supp. at 380-81; 29 C.F.R. § 1607.5(b)(4).

of suspect resistance, make it of little value in determining whether shorter officers use more force than would be necessary for taller officers to use.[11] The possibility of rater bias in the second study is a potentially serious defect, particularly in light of appellants' allegations that the raters were interested in the litigation and aware of the purpose of the study.[12] Appellees' suggestion that methodological defects cannot controvert the probative force of their studies is amply refuted by existing case law. (*Albemarle, supra,* 422 U.S. at 425-35; *Boston Chapter, NAACP, Inc. v. Beecher* (1st Cir. 1974) 504 F.2d 1017; *League of United Latin American Citizens, supra,* 410 F. Supp. 873; *Officers for Justice, supra,* 395 F. Supp. 378.)

Appellants did not confine their attack to methodological disputes; they also introduced evidence of contrary findings of other studies. They discovered that the City had been involved in four other studies that investigated the relationship of height to job perform-

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[11]"Strong force" included everything from firing a weapon to use of a baton, sap, or bar-arm control hold. The study failed to distinguish between these different levels of force when reporting the results, even though the premise of the second study was that shorter officers would use the bar-arm control hold less frequently than other forms of strong force. Although data on suspect resistance were reported, no controls were introduced in the study to determine if the force used was excessive in relation to the level of suspect resistance. Although defendants argued that the study showed that police 5′ 8″ and 5′ 9″ used strong force 31 percent more frequently than officers 6′ 2″ and taller, in fact all the study showed was that there was a 95 percent chance that the level of force used by officers 6′ 2″ and taller was different from the level of force used by officers 5′ 8″ and 5′ 9″.

[12]*See Albemarle, supra,* 422 U.S. at 433 n.32 ("It cannot escape notice that Albemarle's study was conducted by plant officials, without neutral, on-the-scene oversight, at a time when this litigation was about to come to trial. Studies so closely controlled by an interested party in litigation must be examined with great care.")

ance by police. Each of these studies had concluded that height was not significantly related to police job performance. One of the studies, the "Drawn Weapon Frequency Survey," had found no correlation between police officer height and the frequency of drawing a weapon. This finding directly contradicted appellees' contention that shorter officers are more likely to use strong force, particularly force stronger than the bar-arm control hold. They also produced numerous depositions from police officials in other major American cities that have reduced or eliminated minimum height requirements for police. This testimony indicated that persons under 5′ 6″ in height can, and are, safely and efficiently performing all aspects of police work.

Viewing all this evidence in the light most favorable to appellants, appellees failed to establish that the LAPD's height requirement was so manifestly job related as to be justified by business necessity.[13]

Appellees sought to demonstrate the job relatedness of the LAPD's physical abilities test through the results of two validation studies. The first study attempted to correlate performance on the five events used in the physical abilities test with 11 measures of success during Police Academy training.[14] The study found

[13]We express no opinion on the question whether appellees will be able to make a successful showing of business necessity at trial. We only hold that the evidence they presented in support of their motion for summary judgment was insufficient to meet their burden of demonstrating business necessity for the height requirement.

[14]The five events on the physical abilities test were: wall scale (running a total of 50 yards and scaling a smooth wall six feet high); hang (running a total of 50 yards and hanging from a chinning bar, using an overhand grip, for one minute); weight drag (running 50 feet and dragging a dead weight of 140 pounds for 50 feet); tremor (running 50 yards and holding

that four of the five events used in the physical abilities test had some significant correlation with at least seven of the 11 measures of training success. The second study concluded that performance on the physical abilities test had some significant correlation with performance of foot pursuit, field shooting, and emergency rescue simulations. Appellees also submitted affidavits detailing the procedures that were used to develop the physical abilities test.

Appellants attacked both the methodology and conclusions of the validation studies, contending that because the studies excluded persons who had failed the physical abilities test, they were of little value in demonstrating that the physical test excluded persons who would be unlikely to succeed as police officers. Moreover, appellants noted that the LAPD had not used a pre-employment physical test during the five years prior to the time when women were first permitted to apply for police officer positions. They questioned whether the physical test had been developed to test a representative sample of major or critical work behaviors as revealed by a careful job analysis. Extensive deposition testimony was presented indicating that po-

a stylus steady for 17 seconds); endurance (running as many laps around a one-eighth mile track as possible in 12 minutes). The 11 measures of success in police academy training were: academy average (combination of academic performance, performance in physical training, marksmanship, and peer evaluations); target shooting III (score received on final test of target shooting performance given in the academy); combat shooting II and III (scores received on last two tests of combat shooting performance); physical training I, II, and III (scores received in the evaluations of performance in the academy physical training exercise program at three different points during training); self-defense (evaluation of self-defense skills at academy); peer evaluations (at 8 weeks and 16 weeks); graduation (whether the officer completed the police academy training courts), (sic)

lice department in other major American cities that do not use pre-employment physical abilities tests have experienced satisfactory job performance by police. Finally, they also questioned appellees' failure to differentially validate the physical abilities test by sex.

Viewing the record in the light most favorable to appellants, we cannot conclude that appellees met their burden of justifying use of the physical abilities test as a business necessity. The fact that the LAPD hired thousands of male police officers between 1968 and 1973 without using any pre-employment physical test suggests that the practice is not essential to safe and efficient job performance.[15] Moreover, the modest correlations between scores of successful candidates on the physical test and scores during academy training on peer evaluations, tests of physical ability and shooting skills, hardly establish that the physical test is so intimately related to job performance as to be a business necessity.[16] Appellees had to demonstrate that

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[15]*See* Officers for Justice, *supra,* 395 F. Supp. at 384-85; 29 C.F.R. § 1607.11 ("no new test or other employee selection standard can be imposed upon a class of individuals protected by Title VII who, but for prior discrimination, would have been granted the opportunity to qualify under less stringent selection standards previously in force.")

[16]Although appellees' claim that 4 of the 5 events used in the physical abilities test had some significant correlation with at least 7 of the 11 measures of training success sounds impressive, a closer analysis of the study reveals far less impressive results. The 11 measures of academy performance were based only on measures of shooting ability, physical ability, self-defense skills, and peer evaluations. The magnitude of the correlations for all but the 3 measures of physical training were always less than r = .3, indicating that less than 9 percent of the variance in the academy performance measures was explained by performance on the components of the physical abilities test. (*See* Johnston, *Economic Methods* 35 (1972).)

their measures of training success are themselves significantly related to important aspects of job performance and they utterly failed to do so.[17]

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[17]Appellees offered conclusory affidavits to the effect that the measures of academy performance were themselves significantly related to job performance. For example, a police academy instructor justified the peer evaluation measures on the grounds that "[t]he ability to establish a favorable rapport with peers and the public is an essential requirement for the professional Police Officer." While we do not question the desirability of having police officers with social skills, appellees cannot demonstrate that a physical test is job related because it measures the capacity of police to develop rapport with others in training.

We do not read Washington v. Davis, *supra,* 426 U.S. at 250-51, as establishing that selection devices may be validated for Title VII purposes without reference to job performance. Washington v. Davis simply approved the use of a verbal abilities test to determine whether applicants had the capacity to understand a police training program. (*See* Washington v. Davis, *supra,* 426 U.S. at 255-56 (Stevens, J., concurring); *but see* National Education Association v. South Carolina (1978) 434 U.S. 1026 (White, J., dissenting from summary affirmance).) If employers were permitted to validate selection devices without reference to job performance, then non-job-related selection devices could always be validated through the simple expedient of employing them at both the pre-training and training stage. As the Second Circuit noted in Vulcan Society v. Civil Service Commission (2d Cir. 1973) 490 F.2d 387, 396 n.11: "The danger of distortion in this regard is particularly acute, since performance in the probationary school is also evaluated by means of a written examination. Thus, there is a distinct possibility that a claim that the qualifying examination tests for ability to learn in the probationary school is in fact no more than a claim that performance on the written qualifying examination predicts with reasonable accuracy performance on the written probationary examination. Without evidence that the second examination is job-related, such a demonstration is barren indeed."

Here, the strongest correlation shown by appellees' validation study was between performance on the pretraining physical abilities test and performance during training on physical abilities tests. This is not sufficient to validate the use of the physical abilities test without an independent demonstration of its relation to job performance.

Summary judgment on appellants' Title VII claims relating to appellees' post-1973 selection devices must be reversed.[18]

Availability of Less Discriminatory Alternatives

Even if an employer meets his burden of demonstrating business necessity, Title VII plaintiffs may prevail if they show that alternative selection devices are available that would serve the employer's legitimate interests without discriminatory effects. (*Albemarle, supra,* 422 U.S. at 425.) Although the judgment must be reversed on the other grounds heretofore discussed, we nevertheless reach the alternative selection aspect of this Title VII action to avoid repetition of error that occurred in granting the motion for summary judgment.

The district court concluded that the LAPD "could be so structured as to permit the employment of an equal percentage of male and female applicants." (435 F. Supp. at 65.) However, the court held that the LAPD could not be required to adopt less discriminatory alternatives if they required modification of departmental policies. In support of this proposition, the district court cited *Rizzo v. Goode* (1976) 423 U.S. 362. Compliance with the commands of Title VII may indeed require modification of departmental policies, and nothing in *Rizzo v. Goode* suggests that the contrary is true.

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[18]Because the district court premised its rejection of appellants' challenges to other employment practices of the LAPD on its holding that the physical test and height requirement were appropriate selection devices as a matter of law, we need not discuss the other employment practices appellants challenge. We reverse the district court's award of summary judgment in its entirety.

In *Rizzo,* the Supreme Court held that in absence of showing direct responsibility on the part of police officials for violations of rights by a small percentage of the police force, federal courts lacked power to require a local police department to adopt a new civilian complaint processing procedure. In our Title VII case, unlike the situation in *Rizzo,* the appellees here are themselves charged with violations of federal law. Acting pursuant to its constitutional authority, Congress has removed whatever latitude local police departments may ever have had to engage in sex discrimination. So long as non-discriminatory alternatives serve the legitimate interests of the police in safe and efficient job performance, police departments cannot pursue policies that require the use of selection standards that are themselves prima facie violations of Title VII.

III

EQUAL PROTECTION CLAIMS

The district court awarded summary judgment to appellees on the claims founded on the equal protection clause of the Fourteenth Amendment and the Civil Rights Act of 1871. (42 U.S.C. 1983.) The district court held that neither the sex-segregated job classifications used by the LAPD before July 1, 1973, nor the selection devices used by the LAPD after that date, denied appellants equal protection. Because the statutory prohibition of sex discrimination embodied in Title VII is more comprehensive than the constitutional ban, it was necessary for the district court to reach the constitutional issue with respect to the selection devices used only after Title VII became applicable to the LAPD. Thus, we express no opinion about the district court's conclusion that no evidence of dis-

criminatory intent supported appellants' constitutional attack on the employment practices used by the LAPD after July 1, 1973. Because the sex-segregated job classifications were used before Title VII became applicable to the LAPD, we review the district court's holding that this practice did not contravene the equal protection clause.

As the district court recognized, undisputed evidence established that the LAPD used a gender-based system of job classifications during the period before Title VII became applicable to agencies of local government. Separate job classifications existed for men and women. Policewomen were not permitted to undertake regular patrol assignments, and they were barred from promotion above the level of sergeant.

In *Craig v. Boren* (1976) 429 U.S. 190, the Supreme Court outlined the standard of review to be applied to gender-based classifications under the equal protection clause. The Court held that: "classifications by gender must serve important governmental objectives and must be substantially related to the achievement of those objectives." (429 U.S. at 197.) Among the objectives that have been held insufficient to justify gender-based classifications are "administrative ease and convenience," and "fostering 'old notions' of role typing." (*Craig v. Boren, supra,* 429 U.S. at 198; *Frontiero v. Richardson* (1973) 411 U.S. 677; *Stanton v. Stanton* (1975) 421 U.S. 7.)

The district court purported to apply the *Craig v. Boren* standard to determine that the LAPD's gender-based job classifications did not violate the equal protection clause. The district court first concluded "that the qualities of disposition, and physical size and

strength are substantially related to the important governmental objective of providing an effective police force." (435 F. Supp. at 61.) The district court then considered whether gender was substantially related to the selection of police officers with these qualities. Citing *Schlesinger v. Ballard* (1975) 419 U.S. 498, the district court said that "[t]he Supreme Court has at least implicitly approved the exclusive use of men in combat positions. The same factors of size, strength, and disposition which make a man a more effective combatant than a woman in the event of war, also act to make a man a better Police Officer than a woman in those areas where physical tasks are involved." (435 F. Supp. at 60.) Thus, the district court concluded that the LAPD's job classifications did not violate the equal protection clause because "a classification based upon gender is substantially related to and serves [the] important governmental objective [of providing an effective police force]." (435 F. Supp. at 61.)

Even if we assume, *arguendo,* that qualities of size, strength, and disposition are substantially related to the important objective of maintaining an effective police, it does not follow that women may constitutionally be excluded from serving as police officers. It must also be demonstrated that women lack the requisite size, strength, and disposition to be effective police. The Supreme Court's decision in *Schlesinger v. Ballard* provides no support for the proposition that women cannot be effective police or combatants. The issue in *Schlesinger v. Ballard* was not whether women could be excluded from combat duty, but whether the "disadvantageous conditions suffered by women" who were excluded from certain aspects of military service

could be remedied by providing them more time before subjecting them to mandatory discharges. (*Schlesinger v. Ballard, supra,* 419 U.S. at 508 ("Appellee has not challenged the current restrictions on women officers' participation in combat and in most sea duty."); *Craig v. Boren, supra,* 429 U.S. at 198 n.6 ("*Kahn v. Shevin,* 416 U.S. 351 (1974) and *Schlesinger v. Ballard,* 419 U.S. 498 (1975), upholding the use of gender-based classifications, rested upon the Court's perception of the laudatory purposes of those laws as remedying disadvantageous conditions suffered by women in economic and military life").) The Supreme court held that a gender-based classification could be used to remedy a disadvantage shared by all members of one sex to which it applied. (*Schlesinger v. Ballard, supra,* 419 U.S. at 508-10.) Thus, *Schlesinger v. Ballard* provides no authority to support the exclusion of women from police patrol work, though it might support the constitutionality of actions to compensate women for that disadvantage.

It is undisputed that not all women lack the requisite traits to be effective police officers. The LAPD's experience since abolition of its gender-based job classifications amply demonstrates that women can be effective police. The district court did not dispute this. Instead, the court held that "[t]here has to be only a substantial relationship between the relevant traits and gender," in order to justify the exclusion of all persons of one gender from positions requiring the relevant traits. (435 F. Supp. at 60.) This conclusion is contrary to the clear teachings of a long line of Supreme Court decisions that "archaic and overbroad generalizations" cannot justify "statutes employing gender as an inaccurate proxy for other, more germane bases of classification." (*Craig v. Boren, supra,* 429 U.S. at 198; *Weinberger v. Wiesenfield* (1975) 420 U.S. 636 (financial position of working women); *Frontiero v. Richardson* (1973) 411 U.S. 677 (financial position of servicewomen); *Reed v. Reed* (1971) 404 U.S. 71 (capabilities of women to be estate administrators). *Cf. Schlesinger v. Ballard, supra,* 419 U.S. at 508.) The fact that persons of one gender are less likely to possess certain traits than persons of the other gender cannot justify a gender-based classification unless the congruence between gender and possession of the traits is so great, and the prospects of developing more accurate proxies for the traits are so small, that the gender-based classification cannot be said to be based on administrative ease or convenience. (*Craig v. Boren, supra,* 429 U.S. at 198.)

We hold that undisputed facts before the district court established that the gender-based job classifications used before Title VII became applicable to the LAPD violated the equal protection clause of the Fourteenth Amendment. Exclusion of all women from regular police patrol duties and from promotions above the level of sergeant was not substantially related to the achievement of an important governmental objective. Because women could have served as effective police officers during this period, we can only conclude that the dual classification system was designed to serve administrative convenience and not to promote the maintenance of an effective police force. Thus, the gender-based classification system violated the equal protection clause, and appellees were not entitled to summary jdugment on this portion of the constitutional claim.

IV

CROSS-APPEAL OF THE CLASS CERTIFICATION

The district court certified this action as a class action under Rules 23(b)(1) and 23(b)(2) of the Federal Rules of Civil Procedure on June 10, 1976.[19] On July 11, 1977, the district court entered summary judgment in favor of appellees. After appellants filed an appeal from the judgment, appellees filed a cross-appeal from the judgment "insofar as that judgment was based upon the Court's 'Order Certifying Class'." Appellees on cross-appeal ask this court, in the event any issue is remanded for further proceedings, to instruct the district court to re-examine the class certification order. They suggest that the named appellants might not adequately represent the interests of the certified class, but they fail to specify any reasons for this fear.

Orders granting class certification normally are not appealable because they are not "final decisions" within the meaning of 28 U.S.C. § 1291. (*Blackie v. Barrack* (9th Cir. 1975) 524 F.2d 891.) Appellees are able to bring their cross-appeal only because the district court's award of summary judgment to them constituted a final judgment. Because the district court's judgment

[19]The certified class was composed of "all women who are: a) Current and future applicants for all sworn positions at the Los Angeles Police Department, including, but not limited to, current and future applicants for the position of "police officer;" b) All past applicants for sworn positions at the Los Angeles Police Department who applied within the applicable statute of limitations period, including, but not limited to, applicants for the position of "police officer" (or pre-July 1973 equvalent); c) Current and future employees in sworn positions at the Los Angeles Police Department; d) Current and future retirees from such sworn positions at the Los Angeles Police Department who will be eligible for retirement payments or benefits within the applicable statute of limitations period."

was in appellees' favor, their cross-appeal from the class certification order would have become moot if we had affirmed the district court's judgment. The only reason the class certification issue has not become moot is because we reverse the district court's summary judgment award and remand the case for further proceedings, Under these circumstances, it would not be appropriate for us to decide appellees' cross-appeal challenging the class certification order. The same considerations that normally bar interlocutory review of class certification orders (*see Blackie v. Barrack, supra,* 524 F.2d at 895; *see also Coopers & Lybrand v. Livesay* (1978) *437* U.S. 463, 473 ("The potential waste of judicial resources is plain.")), persuade us that we should not now review the class certification order merely because the district court erroneously entered summary judgment for appellees. Because we remand the case for further proceedings, the class certification order may be modified later. (Fed. R. Civ. Proc. 23(c)(1).) Nothing precludes appellees from obtaining review of the order after final judgment ultimately is entered. (*Coopers & Lybrand v. Livesay, supra, 437* U.S. at 469.)

The judgment is reversed and the cause is remanded to the district court for further proceedings consistent with the views herein expressed. Appellants are awarded their costs together with a reasonable attorney's fee as costs for the successful prosecution of this appeal. (42 U.S.C. § 2000e-5(k).)

APPENDIX B.

Memorandum Opinion.

United States District Court Central District of California.

Fanchon Blake, et al., Plaintiffs, v. City of Los Angeles, et al., Defendants. No. CV 73-1962-JWC.

Filed: May 13, 1977.

This class action is an across-the-board attack on alleged sexually discriminatory practices of the City of Los Angeles in the operation of its Police Department. Jurisdiction is claimed under 28 U.S.C. § 1343 (3) and (4). The action is brought under 42 U.S.C. § 1983, the Fourteenth Amendment of the United States Constitution, and Title VII of the Civil Rights Act of 1964, as amended (42 U.S.C. § 2000e, *et seq.*).

The challenged practices have occurred over a time span embracing three different periods; each period brings into play different considerations and different standards of review.

The first relevant period was that prior to March 24, 1972, the date upon which Title VII was made applicable to "governments, governmental agencies [and] political subdivisions." During this period, the City maintained two separate employment classifications for its sworn police officers, "Policemen" and "Policewomen".

The second relevant period runs from the Title VII effective date of March 24, 1972 until June 1973, when the City of Los Angeles put into effect a new hiring system. The City continued the dual system

of Policemen and Policewomen during this fifteen month period.

The third period commences in June 1973, when the City attempted to comply with Title VII. Under the new hiring system, the gender-based classifications were abandoned and the single position of sworn "Police Officer" was established. As a part of the new procedure, the City also established candidate selection criteria and policies relating to promotions, pay grades, transfers, retirement, and pension benefits. Although the new policies were not based on gender, they resulted in a statistically greater impact on women than men.

The defendants have moved for summary judgment. In support of their respective positons upon the issues raised by the motion, the parties have furnished the court with voluminous affidavits and a vast amount of statistical data. In addition thereto, the parties have entered into a pretrial conference order containing a stipulation of facts, which has largely limited the factual issues and greatly facilitated a pretrial determination of the many legal questions presented by this case.

1. STATUTE OF LIMITATIONS

As a threshold issue, the defendants have questioned the statute of limitations applicable to the claims under 42 U.S.C. § 1983. The initial complaint was filed August 20, 1973. It is well settled in California that the applicable statute of limitations for civil rights actions brought under 42 U.S.C. § 1983 is the three year statute provided in section 338(1) of the California Code of Civil Procedure. *Donovan v. Reinbold,* 433 F.2d 738, 741 (9th Cir. 1970), and *Smith v. Cremins,* 308 F.2d 187 (9th Cir. 1962). This being so, plaintiffs' claims are not barred by the applicable statute of limitations.

II. PERIOD PRIOR TO MARCH 24, 1972

Plaintiffs' first challenge is directed to the City's employment practice for the period prior to March 24, 1972, when the City mantained the separate classifications of "Policemen" and "Policewomen". Plaintiffs urge that this classification system violated the equal protection clause of the Fourteenth Amendment. Although Policemen and Policewomen were both sworn officers, they had different lines of promotion and different types of duties. Policemen were assigned to the more physical tasks, including work on patrol and in the field. Policewomen generally were assigned to specialized tasks and inside work.

In our approach to the question of whether these classifications comply with constitutional requirements, we must first decide what standard of review is applicable. This is a problem fraught with some confusion because of the lack of clarity in the case law.

In a "traditional" equal protection analysis, a legislative classification must be sustained unless it is patently arbitrary. *Frontiero v. Richardson,* 411 U.S. 677, 683 (1973). *See, Jefferson v. Hackney,* 406 U.S. 535, 546 (1972); *Richardson v. Belcher,* 404 U.S. 78, 81 (1971); *Dandridge v. Williams,* 397 U.S. 471, 485 (1970); *McGowan v. Maryland,* 366 U.S. 420, 426 (1961); and *Flemming v. Nestor,* 363 U.S. 603, 611 (1960).

The plaintiffs, however, contend that a classification based upon sex is similar to a classification based upon race, alienage, and national origin. A gender-based classification would then be inherently suspect and subjected to close judicial scrutiny.

In *Frontiero v. Richardson, supra,* the challenged statute provided that the spouse of a serviceman was deemed a dependent for purposes of obtaining certain privileges. However, the spouse of a female member of the armed services was not deemed a dependent, unless he were in fact dependent on his wife for over one-half of his support. The government admitted that the only justification for such a classification was "administrative convenience." The Court decided that a classification based upon sex could not be justified on the sole ground of "administrative convenience" and struck down the classification as being a denial of equal protection. In a plurality decision, four justices held that classifications based on sex were inherently suspect and subject to strict judicial scrutiny. 411 U.S. at 688. Mr. Justice Stewart concurred in the result. *Id.* at 691.

Notwithstanding *Frontiero,* a majority of the Supreme Court has not yet added sex to the list of suspect classifications. The Court has suggested, however, that a classification based upon sex will have to be justified by more than the traditional "rational" connection between the classification and some valid legislative purpose. *See, Berkelman v. San Francisco Unified School District,* 501 F.2d 1264, 1269 (9th Cir. 1974.) The Court has never rejected gender as an impermissible classification in all instances. *See, e.g., Schlesinger v. Ballard,* 419 U.S. 498 (1975), and *Kahn v. Shevin,* 416 U.S. 351 (1974).

In *Schlesinger,* the Court upheld a classification based upon sex. In that case a naval officer challenged a statutory mandatory discharge provision, which required his discharge before a similarly situated female officer would be discharged. The Court recognized

the differing types of service which each sex was likely to render and upheld the classification, saying:

> "In both *Reed* and *Frontiero* the reason asserted to justify the challenged gender-based classifications was administrative convenience, and that alone. Here, on the contrary, the operation of the statutes in question results in a flow of promotions commensurate with the Navy's current needs and services to motivate qualified commissioned officers to so conduct themseves that they may realistically look forward to higher levels of command. This Court has recognized that 'it is the primary business of armies and navies to fight or be ready to fight wars should the occasion arise.' *Toth v. Quarles,* 350 U.S. 11, 17. See also *Orloff v. Willoughby,* 345 U.S. 83, 94. The responsibility for determining how best our Armed Forces shall attend to that business rests with Congress, (citations omitted) and with the President. . . . We cannot say that, in exercising its broad constitutional power here, Congress has violated the Due Process Clause of the Fifth Amendment." 419 U.S. at 510.

In my view, the rule governing our inquiry is set forth in *Craig v. Boren,* 429 U.S. 190, 45 U.S.L.W. 4057 (December 20, 1976). After analyzing its recent decisions in this field, the Court stated:

> "To withstand constitutional challenge, previous cases establish that classifications by gender must serve important governmental objectives and must be substantially related to the achievement of those objectives." *Id.* at 4059.

This approach was reaffirmed by the Court in *Califano v. Goldfarb,* 430 U.S. 199, 45 U.S.L.W. 4237 (March

2, 1977). Under this standard of review, we must determine whether the gender-based classification in this case has a substantial relationship to the achievement of an important governmental objective.

The City of Los Angeles has a compelling governmental interest in providing police services to the community. As was stated in *Kelley v. Johnson,* 425 U.S. 238, 247 (1976):

> "The promotion of safety of persons and property is unquestionably at the core of the State's police power, and virtually all state and local governments employ a uniformed police force to aid in the accomplishment of that purpose."

In assessing the relation of gender to this important governmental objective certain basic facts are apparent:

1. One of the most vital functions a municipality performs is the establishment of an effective police force to protect the lives and property of its citizens, to enforce its laws, and to preserve and maintain peace and tranquility within the community.

2. This police force must consist of Police Officers who upon an appropriate occasion have the capacity to restrain, control, subdue, arrest, or capture persons who are a threat to the community, and who are or can become aggressive, vicious or violent.

3. As defendants' affidavits clearly show and common sense confirms, physical size, strength, and agility have a direct relation to the quality of the performance of these functions. It is also important to have the kind of temperment which allows one to engage unhesitatingly in strenuous physical contact with another whenever the occasion demands.

4. These qualities are essential to an effective, efficient, and functional police force.

Therefore, the only remaining question is whether a classification by gender is substantially related to the selection of Police Officers with the necessary qualities. It is not required that all men have the necessary qualities and that no women have them. There has to be only a substantial relationship between the relevant traits and gender.

The qualities in issue here are similar to those which prompt the selection of men for the fighting segments of our armed forces. Congress has not seen fit to draft women, and women are used in the armed forces in positions which have only an incidental relationship to actual combat. The Supreme Court has at least implicitly approved the exclusive use of men in combat positions. In *Schlesinger v. Ballard, supra,* the Court relied on this classification to justify the additional gender-based classification at issue in that case. The same factors of size, strength, and disposition which make a man a more effective combatant than a woman in the event of war, also act to make a man a better Police Officer than a woman in those areas where physical tasks are involved.

Plaintiffs have suggested that a Police Officer needs superior size and strength on relatively few occasions, compared with the other duties an officer is called upon to perform. They therefore conclude that a gender-based classification relevant to these limited situations is not justified. It may well be true that these occasions occur relatively infrequently. But the possibility of such an occurrence exists at all times, and a city is justified in a desire to have a police department

capable of exercising whatever degree of force is required, the instant it is required. Furthermore, a police force known to be capable of striking fast and hard whenever necessity demands is a strong deterrent to criminal activity. The fact that many cities have such a force is almost certainly one reason why instances of physical confrontation are so infrequent.

I conclude therefore that the evidence before this court establishes without substantial contradiction that the qualities of disposition, and physical size and strength are substantially related to the important governmental objective of providing an effective police force. I further conclude that a classification based upon gender is substantially related to and serves this important governmental objective. Therefore, the classification of Policemen and Policewomen as established by the defendants for the period prior to March 24, 1972 was valid and did not offend the equal protection clause of the Constitution.

III. PERIOD FROM MARCH 24, 1972 TO JUNE 1973

On March 24, 1972, the provisions of Title VII were expanded to include governments, governmental agencies, and political subdivisions. Title VII subjects an alleged discriminatory classification to a more stringent judicial scrutiny than was required under an equal protection analysis.

Defendants do not claim that the dual classification system for Policemen and Policewomen in effect during this period would comply with the requirements of Title VII. Defendants contend that, irrespective of whether or not this system can withstand Title VII review, the City was justified in continuing the

practice until at least June 1973, on the grounds of bonafide business necessity.

The "business necessity test" is one criteria used to determine whether a practice is unlawfully discriminatory under Title VII. This test is used because the courts recognize that the continuation of an employment practice is sometimes justified, regardless of its discriminatory impact. The court in *Robinson v. Lorillard Corporation*, 444 F.2d 791, 798 (4th Cir. 1971), stated:

> "The test is whether there exists an overriding legitimate business purpose such that the practice is necessary to the safe and efficient operation of the business. Thus, the business purpose must be sufficiently compelling to override any racial impact; the challenged practice must effectively carry out the business purpose it is alleged to serve; and there must be available no acceptable alternative policies or practices which would better accomplish the business purpose advanced, or accomplish it equally well with a lesser differential racial impact."

When Title VII was first enacted, it provided for a one year grace period to allow private employers to adjust to the provisions of the Act. When it was made applicable to governments, governmental agencies, and political subdivisions, however, no such grace period was provided. Obviously, it would take some time for an agency as large as the Los Angeles Police Department to accommodate itself to the new requirements. The necessity of maintaining a functioning police department during the transition period would surely meet the test of an overriding legitimate business purpose. This necessity would justify the continuance of the employment practice for the period of time reasonably necessary to enable the City to bring itself into compliance with the Act.

The uncontradicted affidavits filed by the defendants detail the activities of those in charge of formulating and implementing the reorganization of the Department. They establish that the City made a good faith effort to comply with the Act, and that the time required to put the revised hiring practice into effect was not unreasonable under the circumstances.

I hold therefore that during the interim period between March 24, 1972 and June 1973, defendants' hiring plan comes within the "business necessity" exemption and consequently did not violate the provisions of Title VII. I have previously concluded that this dual classification system did not violate the Fourteenth Amendment.

IV. PERIOD SUBSEQUENT TO JUNE 1973

In June 1973, the Los Angeles Police Department was reorganized. The dual classifications of "Policewomen" and "Policemen" were abandoned, and a single classification of "Police Officer" was established without reference to sex. With the initiation of this plan, new rules and regulations were promulgated. The new policies included the establishment of certain entry-level selection standards.

Under the new system, an applicant was required to have a minimum height of 5' 7". The height requirement was reduced to 5' 6" less than a year later. An applicant was also required to pass a physical abilities examination designed to test physical endurance, strength, and agility. This test consists of five

events; each event is graded on the basis of 1-100, according to the candidate's performance. The combined score on all events must equal or exceed 350. These tests are:

1. Wall scale—run a total of 50 yards then scale a smooth wall 6 feet high. (17 seconds)

2. Maintain grip—run a total of 50 yards then take an overhand grip on a chinning bar and maintain grip for one minute. (16 seconds run plus 60 seconds on the bar)

3. Weight drag—run 50 feet then drag a dead weight of 140 pounds for 50 feet. (16 seconds)

4. Tremor test—run a total of 50 yards then hold a stylus steady for 17 seconds. (17 seconds run plus 100 points on the stylus)

5 Endurance run—run as many laps as possible in 12 minutes on a one-eight mile track. (10 laps)

(The performance in parenthesis is that which will yield the average passing score of 70 points per test.)

As might well be expected, relatively fewer women than men were able to qualify on the basis of either height or strength. Consequently, these two requirements imposed a severe adverse impact upon women.

A. EQUAL PROTECTION REVIEW OF THE NEW REQUIREMENTS

After some confusion among the circuits, the Supreme Court has recently decided two cases clarifying the requirements of the Fourteenth Amendment. Under an Equal Protection analysis, an adverse statistical impact alone does not establish a prima facie case of unconstitutional discrimination. There must be additional proof of a discriminatory purpose as a motivating factor in the decision. Such a motive need not be the sole

motive, or even the dominant or primary motive, but it must be one of the motives for the decision. *Washington v. Davis,* 426 U.S. 229 (1976), and *Village of Arlington Heights v. Metropolitan Housing Development Corporation,* 429 U.S. 252, 45 U.S.L.W. 4073 (January 11, 1977). In *Washington,* the Court said:

> "[W]e have not held that a law, neutral on its face and serving ends otherwise within the power of government to pursue, is invalid under the Equal Protection Clause simply because it may affect a greater proportion of one race than another. Disproportionate impact is not irrelevant, but it is not the sole touchstone of an invidious racial discrimination forbidden by the Constitution. Standing alone, it does not trigger the rule, *McLaughlin v. Florida,* 379 U.S. 184 (1964), that racial classifications are to be subjected to the strictest scrutiny and are justifiable only by the weightiest of considerations." 426 U.S. at 242.

Since statistical impact alone is not sufficient to establish a prima facie case, and since there is no other evidence of discriminatory purpose or motive upon the record before us,[1] plaintiffs' challenge on Fourteenth Amendment grounds must fail.

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[1]The record before this court contains no evidence of discriminatory intent. Plaintiffs argue that it was the avowed policy of the management officers prior to 1973 to exclude women "per se" from police work. The affidavits, however, do not support this contention. The statements attributed to Chief Davis gives no indication that women "per se" were being excluded; his references to men and women were entirely consistent with the legitimate purposes of the then current classification. If anything, the evidence here shows an intent not to discriminate. For instance, the defendants challenge the minimum height requirement. The City has always had a minimum height require-

(This footnote is continued on next page)

B. TITLE VII STANDARDS OF REVIEW

In a Title VII review, a more probing judicial inquiry is required, and the mere showing of a disproportionate impact alone has been held to establish a prima facie case. *Griggs v. Duke Power Co.*, 401 U.S. 424, 432 (1970). However, if applying Title VII standards to local and state agencies brings into play a standard more stringent than appropriate under the Fourteenth Amendment, there would appear to be a constitutional conflict with the Tenth Amendment. Although the Supreme Court has not yet addressed itself to this issue,[2] two district courts have. *Harrington v. Vandalia-Butler Board of Education*, 418 F. Supp. 603 (S.D. Ohio, 1976), and *Scott v. City of Anniston*, 430 F. Supp. 508, 45 U.S.L.W. 2498 (N.D. Ala., March 31, 1977). The *Harrington* case applied the strict standards of *Griggs v. Duke Power Co., supra,* to state agencies.

In the *Scott* case, the court applied the rule established in *Washington v. Davis, supra,* requiring proof of a discriminatory motive or purpose. In analyzing the problem, the court in *Scott* said:

> "Whether the extension of Title VII to state and local government employment means that impact will not suffice and intent is currently the factor, is decidedly an open question. It hinges

ment, even when all "Police Officers" were men. The minimum height was 5' 9" in 1919. This was lowered to 5' 8" in 1954, and to 5' 7" in 1971. It was lowered again in 1974 to the present requirement of 5' 6", for the specific purpose of lessening the impact on female applicants.

[2]In Fitzpatrick v. Bitzer, 427 U.S. 445 (1976), the Supreme Court expressly stated that they were not presented with a contention ". . . that the substantive provisions of Title VII as applied here are not a proper exercise of congressional authority under section 5 of the Fourteenth Amendment." *Id.* at 456, n.11.

> upon what constitutional grant of power Congress has relied upon in extending the coverage of Title VII over state and local governments. If Congress is seen, as in Fitzpatrick v. Bitzer, 427 U.S. 445 (1976), to have extended Title VII in implementation of the Fourteenth Amendment, no more stringent standard would be appropriate than that for which the Fourteenth Amendment calls, i.e., intent. If Congress is alternatively assumed to have acted in the exercise of its power to regulate interstate commerce, one comes to the Supreme Court's decision in National League of Cities v. Usery, 426 U.S. 833 (1976), in which the Court struck down an attempt by Congress to regulate employment decisions of state and local governments under the Commerce Clause powers of Congress. Without the Commerce Clause as an appropriate alternative basis, it would appear that Congress's extension of Title VII to state and local governments cannot supplant the intent standard of Washington v. Davis, with the more stringent impact standard of Griggs v. Duke Power Co.
>
> In view of this analysis, this court believes that the intent standard, i.e., that there must be proof of discriminatory racial purpose as in Washington v. Davis, should be applied in civil rights litigation brought under Title VII (or 42 U.S.C. §1981). The Supreme Court held in Fitzpatrick, at 620, [Sic, at 447] that the authority for the 1972 amendment extending Title VII to state and local governments was the Fourteenth Amendment * * *. Therefore, it is simple logic that a statute can be no broader than its constitutional base. Consequently, since the extension of Title

> VII to state and local government rests upon the Fourteenth Amendment, the statute cannot be any broader than the constitutional authority upon which it is based. It follows that in Title VII cases against a state or local government the statute is to be construed in accordance with the constitutional test adopted by the Court in Washington; i.e., there must be proof of discriminatory racial purpose." 45 U.S.L.W. at 2498.

The Ninth Circuit has not addressed the constitutional question of the proper scope of Title VII as applied to state and local governments. The Circuit has considered the problem of the requirements of a prima facie case under Title VII, using a "probative" approach. *United States v. Ironworkers Local 86,* 443 F.2d 544 (9th Cir. 1971). In that case, the court upheld a trial court's findings that a prima facie case of discrimination had been established. The appellant sought a reversal on the ground that the prima facie case had been based upon statistics alone. In affirming the decision below, the court said:

> "We are not faced with a situation where a court has relied upon statistical data alone. On the contrary, in its findings, the district court cited specific instances of discrimination on the part of the unions and the apprenticeship committees. Thus the statistical evidence is complementary rather than exclusive." 443 F.2d at 551.

The Fourth Circuit has adopted a similar approach in *Roman v. ESB, Inc.,* 550 F.2d 1343, 14 FEP Cases 235 (4th Cir., December 23, 1976). After analyzing earlier decisions in that circuit, the *Roman* court suggests that statistical impact alone may be sufficient

to establish a prima facie case only where the proof discloses "no objective standards based upon education, experience, ability, length of service, reliability, or aptitude, to account for the preferential employment . . ." 14 FEP Cases at 241.

C. PLAINTIFFS' EVIDENCE

The only evidence plaintiff has offered to support the Title VII claim is statistical analyses of the effect of defendants' height and physical abilities requirements. Statistical comparisons and exhibits often give rise to an inference of racial discrimination. However, the same inference does not necessarily follow when a claim of sexual discrimination is asserted. Contrary to the usual situation involving racial discrimination against a Black, there are obvious physical differences between males and females. If these differences are relevant to an important governmental objective, then the inference of a discriminatory purpose is improper.

Furthermore, an inference raised from statistics is not conclusive proof of discrimination. It merely shifts the burden of proof to the defendant. Statistical evidence does not relieve the court of its obligation to determine whether the plaintiffs have established the truth of their allegations. The defendant may overcome a prima facie case by producing credible evidence which rebuts an inference of discrimination. The defendant is not required to produce a preponderance of such evidence; the risk of nonpersuasion remains with the plaintiff. Thus, the City may refute any inference of discrimination by introducing evidence that explains their employment practices on the basis of legitimate non-discriminatory grounds.

The plaintiff's proof, as noted earlier, consists solely of a showing of statistical impact. There is no separate evidence of a discriminatory pattern or policy. Even if we are to assume, arguendo, that the plaintiff's statistics give rise to an inference of illegal discriminatory motives, the inference has been rebutted by uncontroverted evidence in the record.

D. DEFENDANTS' EVIDENCE

The defendants have offered abundant proof of the objectivity of the requirements of physical size and strength. Plaintiffs urge that the defendants' proof of the job-relatedness of its employment practices does not "validate" the practices in the manner recommended in the EEOC regulations. There is no magic in any validating procedure, and the defendants need only supply competent and relevant evidence on this issue. As the Supreme Court said in *Washington v. Davis:*

> "It appears beyond doubt by now that there is no single method for appropriately validating employment tests for their relationship to job performance." 426 U.S. at 247, n.13.

The more obscure the justifications are, the more searching the inquiry must be. Conversely, the more obvious the relationship between the classification and the job requirements, the less searching the inquiry becomes.

The defendants' affidavits, for the most part, merely point out what is obvious and needs little proof. The affidavits suggest that a stronger and taller officer can more quickly and effectively control another person in the event of a confrontation. This officer is more likely to be able to do so without having to resort to extreme force, such as the use of a gun or a dangerous control hold. In self-defense situations,

the taller and stronger officer is more likely to be successful. The taller the officer, the better his opportunity to observe, evaluate, and properly judge situations in the field. Furthermore, the series of tests to which plaintiffs object was designed by a professional kinesiologist employed by the City specifically to formulate a relevant physical ability test. The expert's opinion that the physical ability test has a direct and rational relationship to the tasks performed by Police Officers, affirms the obvious facts.[8]

Plaintiffs have also contended that defendants' evidence of job relatedness is refuted by the fact that several other police departments use men and women as Police Officers, with less stringent entrance requirements than the City of Los Angeles. Of course, an effective police force can be structured to include both male and female officers. However, this fact does not support plaintiffs' contention that physical size and strength have no relation to the job's requirements. In such an organization sex differences are almost certainly recognized. These characteristics probably in-

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[8]Plaintiffs have filed an affidavit by George H. McGlynn, who purports to be an expert in the effects of stress and fatigue on muscle strength and endurance. Plaintiffs rely upon this affidavit to demonstrate a factual dispute with respect to the propriety of the defendants' physical tests. The McGlynn affidavit states:

> "I will testify that the *only* job related preemployment physical test for a job such as a police officer is a cardiovascular efficiency test . . ."

This statement is inappropriate and without significance in this inquiry. The proposed test determines only whether the particular person is "physically fit". It fails to take into account the wide range of quality-performance variables among those applicants who could successfully pass the cardiovascular efficiency test proposed by the affiant. The defendants' selection tests determine the degree of performance-quality and permit the City to discover the best qualified applicants. In my view, this affidavit raises no issue of fact.

fluence the job assignments made at the administrative level. Certainly, a sane chief of police would not dispatch a group of women of average female height, weight, and strength to contain a public uprising such as the "Watts riots", when the same number of men possessing the height, weight, and strength of average males are available.

The Los Angeles Police Department could be so structured as to permit the employment of an equal percentage of male and female applicants. However, the City has chosen to have a police department where every officer is able to meet any confrontation with the minimum amount of necessary force. In reviewing the City's plan, this court must not lose sight of the well established rule that a government has traditionally been granted the widest latitude in the dispatch of its own internal affairs. *Rizzo v. Goode*, 423 U.S. 362 (1976).

Rizzo involved a claim under 42 U.S.C. § 1983, for an alleged pattern of unconstitutional police mistreatment of minority citizens and city residents in general. The district court ordered the city to submit a program for handling citizen's complaints of police misconduct. A proposed program was thereafter negotiated between the parties and was included in the final judgment of the district court. The Supreme Court held this action was an unwarranted intrusion by the federal judiciary into the discretionary authority committed to the state under the Eleventh Amendment. The Court stated:

> "When plaintiff seeks to enjoin the activity of a government agency, even within a unitary court system, his case must contend with 'the well-established rule that the government has traditionally

> been granted 'he widest latitude in the "dispatch of its own internal affairs".' [citations omitted] The District Court's injunctive order here, significantly revising the internal procedures of the Philidelphia Police Department, was indisputably a sharp limitation on the department's 'latitude in the "dispatch of its own internal affairs".'" 423 U.S. at 378-79.

Our inquiry here cannot extend to the wisdom of the City's decision on the type of police force it desires, nor to possible alternatives directed toward the accomplishment of sociological goals. The question before us is simply, "Does the Los Angeles plan come within permissible constitutional and statutory limits?"

E. TITLE VII CONCLUSIONS

If the court applied the intent standard enunciated in *Scott v. City of Anniston, supra,* there is no evidence of an intent to discriminate, and the Title VII claim must fail. Assuming that the Ninth Circuit or the Supreme Court decides that the *Duke Power Co.* impact standard applies to state and local governments, the Title VII claim would still fail. The undisputed facts before this court are such that the court must conclude as a matter of law that the qualifying tests are appropriate for the selection of qualified applicants for the job in question. The situation here is similar to that in *Washington v. Davis, supra,* 426 U.S. at 245-46, where the Supreme Court stated that it was "untenable" that a verbal abilities test for a police officer position was improper, even if it excluded a large number of Negroes.

V. CUT-OFF SCORES

The plaintiffs claim that the cut-off scores which have been established with respect to the physical abilities test are discriminatory, because they exclude a significantly greater percentage of women. The contention is that the defendants have failed to set these scores at a level reasonably consistent with the normal job requirements. Plaintiffs admit, however, that a cut-off score, although discriminatory, is permissible if the test is job related or "validated". This was made clear in *Griggs v. Duke Power Co.*, where the Court said:

> "Nothing in the Act precludes the use of testing or measuring procedures; obviously they are useful. What Congress has forbidden is giving these devices and mechanisms controlling force unless they are demonstrably a reasonable measure of job performance. Congress has not commanded that the less qualified be preferred over the better qualified simply because of minority origins. Far from disparaging job qualifications as such, Congress has made such qualifications the controlling factor, so that race, religion, nationality, and sex become irrelevant. What Congress has commanded is that any test used must measure the person for the job and not the person in the abstract." 401 U.S. 424, 436 (1971).

As noted earlier, the validity of these tests has been established by defendants' evidence. In addition, the tests were designed by professionals for the express purpose of testing applicants for the type of police work which is now being done in the Los Angeles area. Since the tests are job related, the setting of cut-off scores is a matter for the employer's judgment. Many factors may go into this decision, such as the

number of applicants available, the cost of failures in training and on the job, the critical nature of the job to be prformed, and the level of performance at which the employer desires employees to perform.

VI. POLICE ACADEMY

The plaintiffs challenge the program at the Los Angeles Police Academy on the ground that its physical training requirements are set so high that more females fail to meet them than males. A resolution of this issue involves the same considerations which we have previously discussed. The Academy's training program, insofar as it relates to physical performance, is closely related to the job requirements. Therefore, the statistical impact upon women is not relevant.

VII. PERSONNEL POLICIES

Plaintiffs have attacked the defendants' personnel policies as they relate to job assignments, pay grades, promotions, and pensions. This challenge is predicated upon the assumption that the employment policies of the defendants at the entry level or at other times during plaintiff's employment, have been impermissibly discriminatory. It is not contended that these policies, in and of themselves, contain provisions which create a disproportionate impact upon females. A finding that the employment policies of the defendants are in other respects proper is a complete response to this challenge.

VIII. NO AFFIRMATIVE ACTION REQUIRED

Plaintiffs have claimed that defendants' failure to take affirmative action constitutes unlawful discrimination. Plaintiffs contend that defendants should have accelerated hiring and promotion of women to remedy the effects of past discrimination.

Like some of the other contentions made by the plaintiffs, this charge assumes past illegal discrimination in hiring and promotions. In light of this court's finding that the evidence in the record before us fails to establish any prior illegal discriminatory practices in hiring and promotions, defendants are entitled to summary judgment on this issue.

IX. VETERAN'S PREFERENCES

Although plaintiffs' complaint attacks the use of veteran's preferences in the defendants' employment practices, plaintiffs have since withdrawn that attack and the issue is no longer before this court.

X. CONCLUSION

The keystone of the plaintiffs' case is their contention that a woman can peform all the tasks involved in the performance of the job of Police Officer. Plaintiffs therefore conclude that the City must establish employment practices which will result in an equal proportion of male and female applicants being accepted as Police Officers. Assuming, arguendo, that women can perform all of these tasks to some degree, the fact remains that many men, because of their physical characteristics, can perform certain important functions better than a large majority of women. As the Supreme Court said in *Griggs v. Duke Power Co., supra* at 436:

> "Congress has not commanded that the less qualified be preferred over the better qualified simply because of minority origins."

There is nothing in Title VII which would require an employer to hire a qualified woman in preference to a more qualified man. Title VII was enacted to eliminate sex as a factor in the employment context, not to establish it as a primary consideration.

The City of Los Angeles has decided to establish a police force with certain characteristics that are related to the proper exercise of its police powers. The fact that proportionately more men than women possess the desired characteristics does not invalidate the City's decision, unless there is some discriminatory intent not shown here.

I find, therefore, that upon the record before this court there is no genuine issue as to any material fact to be litigated, and that the defendants are entitled to judgment as a matter of law.

Let summary judgment issue in favor of the defendants.

DATED: May 13, 1977

/s/ Jesse W. Curtis
JESSE W. CURTIS
United States District Judge

APPENDIX C.

Opinion.

United States Court of Appeals, for the Ninth Circuit.

United States of America, Plaintiff-Appellant, v. City of Los Angeles, et al., Defendants-Appellees. No. 77-3460.

Appeal from the United States District Court for the Central District of California.

Filed: May 2, 1979.

Before: HUFSTEDLER and TANG, Circuit Judges, and SOLOMON,* District Judge.

HUFSTEDLER, Circuit Judge:

The Government appeals from an order enjoining the United States from pursuing any administrative action or investigation regarding employment discrimination by the Los Angeles Police Department ("LAPD"), from terminating any funds to the City of Los Angeles ("City") because of personnel practices of the LAPD, and from failing to grant any request by the City for federal funding because of allegations of employment discrimination by the LAPD.[1] We hold

*Honorable Gus J. Solomon, Senior United States District Judge, District of Oregon, sitting by designation.

[1]The injunction reads as follows: "The federal Government, including all agencies and departments thereof, are hereby enjoined from pursuing or initiating administrative actions, reviews, or investigations pertaining to or arising from alleged employment discrimination relating to the Los Angeles Police Department; from terminating any federal funding to the City of Los Angeles or any department or agency thereof as a result of or arising out of any personnel practice(s) relating to the Los Angeles Police Department; and from using any allegations of employment discrimination relating to the Los Angeles Police Department as a reason to fail to grant or to otherwise disapprove the funding of federal grant programs for which the City applies."

that the City did not carry its burden of demonstrating facts entitling it to "preliminary relief" within the meaning of the Omnibus Crime Control and Safe Streets Act of 1968 ("Safe Streets Act," 42 U.S.C. § 3766(c)(2)(E)) because the City did not meet even the minimal standards for obtaining injunctive relief, and we vacate the injunction.

On June 2, 1977, the United States filed this action charging the LAPD with a pattern and practice of employment discrimination aganst blacks, women, and Spanish-surnamed persons. The complaint alleged violations of Title VII of the Civil Rights Act of 1964 (42 U.S.C. §§ 2000e *et seq.*, as amended), the State and Local Fiscal Assistance Act of 1972 ("Revenue Sharing Act," 31 U.S.C. § 1242, as amended), and the Safe Streets Act. Pursuant to motions filed both by the City and the Government, the proceedings were stayed pending disposition of the appeal in *Blake v. City of Los Angeles* (C.D. Cal. 1977) 435 F. Supp. 55.[2]

I

"The United States, as sovereign, is immune from suit save as it consents to be sued [citations omitted], and the terms of its consent to be sued in any court define that court's jurisdiction to entertain the suit." (*United States v. Sherwood* (1941) 312 U.S. 584, 586; *United States v. Agnew* (9th Cir. 1970) 423 F.2d 513.) The United States does not waive its sovereign immunity by instituting the action in which a

[2]In Blake v. City of Los Angeles (C.D. Cal. 1977) 435 F. Supp. 55, the same district court awarded summary judgment to defendants in a private class action alleging sex discrimination by the LAPD in violation of Title VII and the Fourteenth Amendment. Today we reverse the district court's decision in *Blake, ante,* at ...., and remand for further proceedings.

defendant asserts a claim for affirmative relief against the United States. (*United States v. Eckford* (1867) 6 Wall. (73 U.S.) 484; *United States v. Mel's Lockers, Inc.* (10th Cir. 1965) 346 F.2d 168; *United States v. Patterson* (5th Cir. 1953) 206 F.2d 345. *See also Larson v. Domestic & Foreign Commerce Corp.* (1949) 337 U.S. 682, 703-04. 14 Wright-Miller-Cooper, Federal Practice and Procedure § 3654, pp. 156 *et seq.* (1976).)

Consent to suit in this case rests solely on the Safe Streets Act. Accordingly, we turn our attention to that statute to ascertain the jurisdictional predicate for the injunction as well as to determine the applicable standards which govern the grant of the injunction.

II

The Safe Streets Act require the Law Enforcement Assistance Administration ("LEAA") to suspend payment of funds to the LAPD 45 days after filing this action unless the district court correctly granted "preliminary relief." (42 U.S.C. § 3766(c)(2)(E).) Defendants seeking to enjoin automatic suspension of LEAA funds under the statute must meet the normal standards for obtaining injunctive relief, absent explicit provisions to the contrary in the statute. (*United States v. Commonwealth of Virginia* (4th Cir. 1978) 569 F.2d 1300.)

The City contends that Section 518(b) of the Safe Streets Act (42 U.S.C. § 3766(b)) required the district court to issue an injunction restraining LEAA from cutting off the funding. That section provides that the Act shall not authorize LEAA "to deny or discontinue a grant" because of a refusal to adopt "a percentage ratio, quota system, or other program to achieve

racial balance or to eliminate racial imbalance in any law enforcement agency."[3] The City's theory is that the reason the Government brought this suit was the refusal of the LAPD to adopt a quota system for police hiring proposed by LEAA. In support of its contention, the City refers to facts recited in affidavits accompanying its petition for injunctive relief that this action was filed only after LAPD had refused to adopt a voluntary compliance agreement setting "goals" and "time tables" for increasing the percentage of blacks, women, and Spanish-surnamed persons employed by the LAPD.

Even if we assume, *arguendo*, that the "goals" and "time tables" proposed by LEAA constitute a "quota system," it was not a system forbidden by Section 518(b) because there is no evidence that the system was part of a "program to achieve racial balance" within the meaning of the statute. The phrase "program to achieve racial balance" is a term of art referring to attempts to remedy racial disparities that were not produced by discrimination. (*Swann v. Charlotte-Mecklenburg Board of Education* (1971) 402 U.S. 1, 17-18.)[4] A "quota system" directed toward alleviating

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[3]42 U.S.C. § 3766(b) provides: "Notwithstanding any other provision of law nothing contained in this chapter shall be construed to authorize the Administration [LEAA] (1) to require, or condition the availability or amount of a grant upon, the adoption by an applicant or grantee under this chapter of a percentage ratio, quota system, or other program to achieve racial balance or to eliminate racial imbalance in any law enforcement agency, or (2) to deny or discontinue a grant because of the refusal of an applicant or grantee under this chapter to adopt such a ratio, system, or other program."

[4]Since Congress has re-enacted Section 518(b) twice since the *Swann* decision, it is reasonable to conclude that Congress was aware of the legal significance of the "racial balance" language. (*See* Drummond v. Acree (1972) 409 U.S. 1228 (Powell, Circuit Justice, on reapplication for stay).)

gender-based discrimination is obviously outside the purview of efforts "to achieve a racial balance." Of greater moment, however, there is nothing in the record to suggest that the federal Government sought to remedy racial disparities not created by unlawful discrimination. The prospective suspension of LEAA funds was the product of a lawsuit alleging a pattern or practice of unlawful discrimination. It is undisputed that one of the reasons that negotiations between LEAA and the City collapsed was the City's refusal to abandon the use of its physical tests, height requirement, and written tests for the selection of police officers. This refusal can hardly be called a refusal to adopt a "quota system." Moreover, in the companion case, *Blake v. City of Los Angeles* (9th Cir. 1979) ..... F.2d ....., we hold that the physical test and height requirement are prima facie violations of Title VII that must be justified by a showing of business necessity.[5]

To sustain the granting of the preliminary injunction, the burden was on the City to demonstrate either probable success on the merits and the possibility of irreparable harm, or serious questions going to the merits and a balance of hardships tipping sharply in its favor. (*William Inglis & Sons Baking Co. v. ITT Continental Baking Co.* (9th Cir. 1975) 526 F.2d 86.) The district court did not make any separate findings of fact and conclusions of law to support the issuance of the injunction. The basis for the district court's decision appears in the court's Memorandum Opinion: "In order to maintain the status quo and to prevent irreparable injury to the law enforcement plans and programs of the Police Department of the

[5]The district court made no finding relevant in any respect to this issue.

City of Los Angeles pending the outcome of this litigation, the injunction as prayed for should likewise be granted." The court also stated, citing its opinion in *Blake v. City of Los Angeles* (C.D. Cal. 1977) 435 F. Supp. 55, "[i]t does not appear . . . that the plaintiff's ultimate success in this case is probable." Because we have reversed *Blake*, the district court's prediction of the City's probable success on the merits is erroneous.[6]

The record failed to demonstrate that LAPD would suffer any irreparable injury in the absence of an injunction. To be sure, the City faced prospective suspension of LEAA funding to the LAPD. As a matter of law, the loss of this funding cannot be deemed irreparable injury in the absence of a more convincing showing than that made by the City here.[7] Congress deliberately imposed an automatic suspension of funding to achieve the purposes of the legislation by creating an additional incentive for compliance with the non-discrimination provisions of the Safe Streets Act. Actions undertaken by the Attorney General, as in this case, or by other administrative agencies charged with the responsibility to enforce the provisions of the Safe Streets Act, the Revenue Sharing Act, and Title VII cannot be enjoined simply because those actions may require recipients of congressional largesse to expend large amounts of

[6]The City argues that, *Blake* aside, it will ultimately prevail on the merits because of claimed jurisdictional deficiencies in the Government's lawsuit. It is unnecessary for us to reach any of these contentions for two reasons: First, jurisdiction was adequately founded on the non-discrimination provisions of the Safe Streets Act (42 U.S.C. § 3766(c)), and second, the district court did not address any of these contentions in granting the injunction.

[7]Affidavits submitted by the City indicate that the primary effect of a loss of these funds would be the reassignment of certain officers participating in a program to control street gangs.

time and taxpayers' resources. (*See Renegotiation Board v. Bannercraft Clothing Co.* (1974) 415 U.S. 1, 24 ("Mere litigation expense, even substantial and unrecoupable cost, does not constitute irreparable injury."); *cf. City of Milwaukee v. Saxbe* (7th Cir. 1976) 546 F.2d 693.)

Finally, an order enjoining the suspension of LEAA funds cannot be justified on the grounds that it was necessary "to maintain the status quo." Congress has directed that the status quo cannot be maintained following the filing of a "pattern or practice" complaint by the Attorney General under the Safe Streets Act. It would defeat the purpose of the automatic fund suspension provision of Section 3766(c)(2)(E) to enjoin the suspension of such funds to maintain the status quo that the statute was designed to disrupt. (*See, e.g., United States v. County of Milwaukee (E.D. Wis.* 1978) 449 F. Supp. 949, 951.)[8]

On remand, the district court should reconsider the United States' request for preliminary relief under the standards outlined in this opinion and in *Blake v. City of Los Angeles, ante* at .....

The injunction is vacated and the cause is remanded to the district court for further proceedings consistent with the views herein expressed.

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[8]The City has conceded on appeal that the injunction is indefensibly overbroad. Neither the Safe Streets Act nor any other relevant statute provides consent of the United States to jurisdiction pursuant to which the district court could enjoin the federal government and all of its agencies and departments "from pursuing or initiating administrative actions, reviews, or investigations pertaining to or arising from alleged employment discrimination relating to the Los Angeles Police Department," or from "using any allegations of employment discrimination relating to the Los Angeles Police Department as a reason to fail to grant or to otherwise disapprove the funding of federal grant programs for which the City applies."

APPENDIX D.

Memorandum.

United States District Court, Central District of California.

United States of America, Plaintiff, v. City of Los Angeles, etc., et al., Defendants. No. CV 77-1986-JWC.

Filed: July 13, 1977.

The defendants have moved to stay all proceedings in this case pending a final determination of the appeal in *Blake v. City of Los Angeles, et al.*, No. CV 73-1962-JWC, recently decided by this court. Defendants have also moved for an injunction to enjoin the government from acting through any of its agencies to terminate federal funding to the City of Los Angeles because of any personnel practices used by the Los Angeles Police Department.

The government agrees that a stay of these proceedings is proper insofar as it relates to discrimination based upon sex. However, the government urges that discovery in this case should go forward on the issue of discrimination based upon race, not raised in *Blake*. Then if the *Blake* decision is reversed and the case remanded for trial, the *Blake* case and this case can be tried together.

In *Blake*, this court held, *inter alia*, that the usual Title VII standards for determining whether employment practices are permissible cannot constitutionally be applied to state agencies. If that holding is sustained on appeal, any extensive discovery such as plaintiff would be likely to carry out in this case would be irrelevant. It is therefore this court's opinion that until

some definitive ruling is made by some higher court on this issue, this court would be at a loss to know how to direct discovery. In an effort to avoid the vast amount of discovery such as was done in *Blake,* most of which was unnecessary under the court's ruling, the defendants' request for a stay should be granted.

In order to maintain the status quo and to prevent irreparable injury to the law enforcement plans and programs of the Police Department of the City of Los Angeles pending the outcome of this litigation, the injunction as prayed for should likewise be granted.

The plaintiff has moved to enjoin the City of Los Angeles from further hiring of persons for the position of police officer by the Los Angeles Police Department, pending trial of this case on its merits. In my view, such an injunction would be unwise for the following reasons:

1. Federal interference with a municipality in the performance of a governmental function is always a matter of great concern and should be avoided except where some mandate of the United States Constitution is clear and definite.

2. In light of the court's decision in *Blake,* there is no constitutional mandate to justify such an injunction. It does not appear to this court that the plaintiff's ultimate success in this case is probable.

3. Since it may be many months, or perhaps even years, before the issues raised by *Blake* are finally determined, there will consequently be some considerable time before this case can be brought to judgment. An injunction such as plaintiff requests would cripple the Los Angeles Police Department, perhaps tragically, in its efforts to carry out a most important governmental function.

4. In the event the plaintiff should ultimately succeed, any racial or sexual discrimination which the court then finds impermissible, can in large measure be compensated for by such affirmative relief as the court may then see fit to order.

For these reasons, plaintiff's request for preliminary injunction is denied.

DATED: July 13, 1977

/s/ Jesse W. Curtis
JESSE W. CURTIS
United States District Judge

APPENDIX E.

Order Regarding Motion to Stay Proceedings and to Enjoin Fund Cutoffs.

United States District Court, Central District of California.

United States of America, Plaintiff, vs. City of Los Angeles, etc., et al., Defendants. Civil Action No. 77-1986-JWC.

Filed: July 13, 1977.

Defendants have moved for an Order to stay the instant action and for an injunction enjoining the Federal Government, its agencies and departments from terminating any federal funds received by the City of Los Angeles. Plaintiff opposes the motion. After having considered the moving papers and opposition thereto, points and authorities, affidavits and memorandum in support of and in opposition to the motion, and oral argument,

IT IS SO ORDERED that:

1. The instant action, *United States of America v. City of Los Angeles, etc., et al.,* Civil Action No. 77-1986-JWC be stayed until such time as any appeals of the Court's judgment in *Blake v. City of Los Angeles,* Civil Action No. 73-1962-JWC have been exhausted; and that,
2. The federal Government, including all agencies and departments thereof, are hereby enjoined from pursuing on initiating administrative actions, reviews, or investigations pertaining to or arising from alleged employment discrimination relating to the Los Angeles Police Depart-

ment; from terminating any federal funding to the City of Los Angeles or any department or agency thereof as a result of or arising out of any personnel practice(s) relating to the Los Angeles Police Department; and from using any allegations of employment discrimination relating to the Los Angeles Police Department as a reason to fail to grant or to otherwise disapprove the funding of federal grant programs for which the City applies.

SO ORDERED this 13 day of July 1977, at Los Angeles, California.

/s/ Jesse W. Curtis
UNITED STATES DISTRICT COURT JUDGE

Presented by:
BURT PINES, City Attorney
JOHN B. RICE, Senior Assistant City Attorney
CECIL W. MARR, Deputy City Attorney
ROBERT J. LOEW, Deputy City Attorney

By /s/ Cecil W. Marr
CECIL W. MARR
Attorneys for Defendants.

APPENDIX F.

Pertinent Constitutional Provisions.

Tenth Amendment.

The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

Fourteenth Amendment, Sections 1 and 5.

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

APPENDIX G.

Sections 703(a) and (h) of Title VII of the 1964 Civil Rights Act, as Amended.

SEC. 703.(a) It shall be an unlawful employment practice for an employer—

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

* * *

(h) Notwithstanding any other provision of this title, it shall not be an unlawful employment practice for an employer to apply different standards of compensation, or different terms, conditions, or privileges of employment pursuant to a bona fide seniority or merit system, or a system which measures earnings by quantity or quality of production or to employees who work in different locations, provided that such differences are not the result of an intention to discriminate because of race, color, religion, sex, or national origin, nor shall it be an unlawful employment practice for an employer to give and to act upon the results of any professionally developed ability test provided that such test, its administration or action upon the results

is not designed, intended or used to discriminate because of race, color, religion, sex or national origin. It shall not be an unlawful employment practice under this title for any employer to differentiate upon the basis of sex in determining the amount of the wages or compensation paid or to be paid to employees of such employer if such differentiation is authorized by the provisions of section 6(d) of the Fair Labor Standards Act of 1938, as amended (29 U.S.C. 206(d)).

APPENDIX H.

Sections 518(a), (b), (c)(1) and (c)(2)(E) of the Omnibus Crime Control and Safe Streets Act of 1968, as Amended.

Sec. 518. (a) Nothing contained in this title or any other Act shall be construed to authorize any department, agency, officer, or employee of the United States to exercise any direction, supervision, or control over any police force or any other law enforcement agency of any State or any political subdivision thereof.

(b) Notwithstanding any other provision of law nothing contained in this title shall be construed to authorize the Administration (1) to require, or condition the availability or amount of a grant upon, the adoption by an applicant or grantee under this title of a percentage ratio, quota system, or other program to achieve racial balance or to eliminate racial imbalance in any law enforcement agency, or (2) to deny or discontinue a grant because of the refusal of an applicant or grantee under this title to adopt such a ratio, system, or other program.

* * *

(c)(1) No person in any State shall on the ground of race, color, religion, national origin, or sex be excluded from participation in, be denied the benefits of, or be subjected to discrimination under or denied employment in connection with any program or activity funded in whole or in part with funds made available under this title.

* * *

(c)(2)(E) Whenever the Attorney General files a civil action alleging a pattern or practice of discriminatory conduct on the basis of race, color, religion, na-

tional origin, or sex in any program or activity of State government or unit of local government which State government or unit of local government receives funds made available under this title, and the conduct allegedly violates the provisions of this section and neither party within forty-five days after such filing has been granted such preliminary relief with regard to the suspension or payment of funds as may be otherwise available by law, the Administration shall suspend further payment of any funds under this title to that specific program or activity alleged by the Attorney General to be in violation of the provisions of this subsection until such time as the court orders resumption of payment.

Supreme Court, U. S.
FILED
SEP 13 1979
MICHAEL RODAK, JR., CLERK

No. 79-54

In the Supreme Court of the United States

OCTOBER TERM, 1978

CITY OF LOS ANGELES, ET AL., PETITIONERS

v.

FANCHON BLAKE, ET AL.

CITY OF LOS ANGELES, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

WADE H. MCCREE, JR.
Solicitor General

DREW S. DAYS, III
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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals in *Blake* v. *City of Los Angeles* (Pet. App. 1-37) is reported at

595 F.2d 1367. The opinion of the court of appeals in *United States* v. *City of Los Angeles* (Pet. App. 62-68) is reported at 595 F.2d 1386. The opinion of the district court in *Blake* v. *City of Los Angeles* (Pet. App. 38-61) is reported at 435 F. Supp. 55. The opinion and order of the district court in *United States* v. *City of Los Angeles* (Pet. App. 69-71, 72-73) have not been officially reported.

JURISDICTION

The judgments of the court of appeals in these cases were entered on May 2, 1979. The petition for a writ of certiorari was filed on July 12, 1979. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

The pertinent provisions of the Constitution and federal statutes are reproduced at Pet. App. 74-78.

QUESTIONS PRESENTED

1. Whether a local government violates the Equal Protection Clause by utilizing gender-based job classifications of "policeman" and "policewoman" that limit the duty assignments and promotional opportunities available to women.

2. Whether Congress may constitutionally prohibit state and local governments from engaging in employment practices that have a discriminatory impact on employment opportunities for minorities and women,

without requiring proof that these practices are discriminatory in intent.

3. Whether the court of appeals correctly determined that petitioners had failed to demonstrate that there were no disputed issues of material fact with respect to the claim that their pre-employment minimum height requirement and physical agility test were justified by business necessity.

4. Whether the court of appeals correctly concluded that petitioners failed to show sufficient grounds to enjoin the suspension of federal law enforcement assistance funds pursuant to Section 518 (c)(2)(E) of the Omnibus Crime Control and Safe Streets Act of 1968, 42 U.S.C. 3766(c)(2)(E).

STATEMENT

The petition for a writ of certiorari seeks review of the judgments entered in two related cases, *Blake* v. *City of Los Angeles* and *United States* v. *City of Los Angeles*. Although similar questions of law are involved in these two cases, the cases have not been consolidated in the proceedings below. The United States, which is a party in *United States* v. *City of Los Angeles*, submitted a brief as *amicus curiae* in the court of appeals in *Blake* v. *City of Los Angeles*. We therefore address petitioners' contention that the judgments in both cases should be reviewed by this Court.

1. The complaint in *Blake* v. *City of Los Angeles* was filed in 1973. It alleged that, prior to 1973, the Los Angeles Police Department (LAPD) employed

gender-based job classifications that limited the duty assignments and promotional opportunities of women, and thus discriminated against them on the basis of sex, in violation of the Equal Protection Clause and Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.* The complaint further alleged that, when the gender-based classifications were removed in 1973, LAPD instituted a pre-employment minimum height requirement and physical agility test that discriminates against women on the basis of sex, in violation of Title VII.

Plaintiffs moved for injunctive relief and petitioners responded with a motion for summary judgment. Both parties submitted voluminous affidavits and documents in support of their positions. On May 13, 1977, without holding an evidentiary hearing, the district court granted petitioners' motion for summary judgment. The court held that the separate pre-1973 job classifications for "policeman" and "policewoman" did not violate the Equal Protection Clause because petitioners' affidavits and "common sense" show that physical size, strength and agility are apportioned along sexual lines, that these traits are directly related to the ability of an officer to perform the duties assigned to a "policeman," and that the police job classifications based on sex are therefore substantially related to an important governmental objective (Pet. App. 43-45).

The court also held that when Congress enacted the 1972 amendments to Title VII to include coverage for state and local governments (see 42 U.S.C.

2000e(f)), it did not prohibit public employers from utilizing job classifications which have a discriminatory impact unless a discriminatory intent is also proven (Pet. App. 50-53). The court held that the evidence offered in plaintiffs' affidavits and documents did not establish a *prima facie* case of intentional discrimination in this case (Pet. App. 53-54). The court held that, even if a *prima facie* violation of Title VII by a local government could be shown solely by proof that the LAPD pre-employment height and strength tests have a differential impact that excludes more women than men from police employment (see *Griggs* v. *Duke Power Co.*, 401 U.S. 424 (1971); *International Brotherhood of Teamsters* v. *United States*, 431 U.S. 324, 335 n.15 (1977)),[1] plaintiffs' proof was deficient because the City had shown that physical size and strength are appropriate criteria for selecting police officers (Pet. App. 57).

2. The complaint in *United States* v. *City of Los Angeles* was filed in 1977. It alleged that the pre-employment minimum height requirement and physical agility test employed by the LAPD excluded disproportionate numbers of female applicants, and that the written examinations used by the LAPD excluded disproportionate numbers of minority applicants. The United States claimed that these practices constituted unlawful patterns and practices of discrimination in

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[1] Plaintiffs' affidavits showed that the LAPD height requirement (5'6") excluded 87 percent of adult women and only 20 percent of adult men (Pet. App. 10). The physical agility test was failed by 50 percent of the women and 3 percent of the men who took it (*ibid.*).

violation of Title VII, the State and Local Fiscal Assistance Act of 1972, 31 U.S.C. 1242, and the Omnibus Crime Control and Safe Streets Act of 1968 (Safe Streets Act), 42 U.S.C. 3766(c)(3). The United States agreed to a stay of the portion of its case challenging the sex discriminatory practices of the LAPD pending appellate review of the decision of the district court in *Blake*.

The Safe Streets Act contains a provision that requires the Law Enforcement Assistance Administration (LEAA) to suspend the transfer of federal assistance payments to any state or local government agency whenever the Attorney General brings suit against that agency claiming that it has engaged in a pattern or practice of discrimination. The suspension is mandatory unless "within forty-five days after such filing [either party] has been granted such preliminary relief with regard to the suspension or payment of funds as may be otherwise available by law * * *." 42 U.S.C. 3766(c)(2)(E). Before the forty-five day period expired, petitioners moved the district court to enjoin this suspension of LEAA funding. On July 13, 1977, the district court granted petitioners' motion and enjoined the United States from suspending LEAA funding (Pet. App. 69). The court granted the motion "to maintain the status quo and to prevent irreparable injury" to the LAPD's law enforcement programs (Pet. App. 70). The court also stated that, given its earlier decision in *Blake*, "[i]t does not appear * * * that the [United States'] ultimate success in this case is probable" (*ibid.*).

3. The court of appeals reversed the judgments of the district court.

a. In *Blake*, the court held that when Congress extended the provisions of Title VII to state and local governments in 1972 it intended to subject governmental employers to the same non-discriminatory requirements imposed on private employers. Thus, a *prima facie* case of discrimination against a government employer may be established by a showing that the challenged practice has a discriminatory differential impact even without evidence of discriminatory intent (Pet. App. 6-9). The court held that this construction of Title VII did not conflict with *Washington* v. *Davis*, 426 U.S. 229 (1976) (proof that state employment practices violate the Equal Protection Clause requires a showing of discriminatory intent), because, in enacting legislation under Section 5 of the Fourteenth Amendment, Congress is not limited to prohibiting state action that independently violates the Constitution (Pet. App. 6-7, citing *Katzenbach* v. *Morgan*, 384 U.S. 641 (1966)).

Accordingly, the court held that plaintiffs established a *prima facie* violation of Title VII by their proof that the pre-employment minimum height requirement and physical agility test exclude a disproportionate percentage of female applicants from police employment (Pet. App. 11). The court concluded that the evidence offered by petitioners to show that the LAPD's employment criteria "were so job related as to be justified by business necessity"

(id. at 18) was not sufficient to support summary judgment on this issue.[2]

The court also held that the pre-1973 gender-based job classifications of "policeman" and "policewoman" violated the Equal Protection Clause (Pet. App. 31-35). The court stated that the district court erred in applying "archaic and overbroad generalizations" as an "inaccurate proxy for other, more germane bases of classification" (Pet. App. 34-35, quoting *Craig* v. *Boren*, 429 U.S. 190, 198 (1976)). The fact that men are generally larger and stronger than women thus cannot support a conclusion that all women may be excluded from employment reserved for men only (Pet. App. 34-35).

b. In *United States* v. *City of Los Angeles* the court of appeals reversed the district court's order enjoining the suspension of LEAA funding,[3] holding that petitioners had failed to establish grounds for preliminary injunctive relief. The court stated that

[2] Plaintiffs had pointed out deficiencies in the City's validation studies, which, when viewed alongside federal guidelines for such studies, indicated that the question of business necessity was not appropriate for summary judgment (Pet. App. 27-28). The court also pointed out that the plaintiff had shown that other police departments had successfully removed height requirements with no adverse effects on police department performance.

The court also held that no business necessity had been established for use of the pre-1973 gender-based job classifications of "policeman" and "policewoman" (Pet. App. 16).

[3] The court of appeals also reversed other injunctive relief granted to the City by the district court (see Pet. App. 63-68). Petitioners have not raised these issues in the petition for a writ of certiorari.

petitioners had failed to prove they "would suffer any irreparable injury in the absence of an injunction" (Pet. App. 67) and that the district court had erred in concluding that petitioners' defense would probably succeed on the merits (Pet. App. 66-67). The court of appeals also held that the injunction could not be justified as essential to maintain the "status quo." The purpose of the mandatory suspension provision would be frustrated if suspension could be forestalled in every case merely to maintain the "status quo that the statute was designed to disrupt" (Pet. App. 68).

ARGUMENT

The decisions of the court of appeals are correct and do not conflict with any decision of this Court or the other courts of appeals. Moreover, the decisions are interlocutory and the court of appeals has remanded both cases for additional proceedings in the district court. Further review by this Court at this time is thus not warranted. See *Brotherhood of Locomotive Firemen & Enginemen* v. *Bangor & Aroostook Railroad Co.*, 389 U.S. 327 (1967).

1. The court of appeals correctly concluded (Pet. App. 34-35) that the pre-1973 gender-based classifications of "policeman" and "policewoman"—which limited the duty assignments and promotional opportunities of women—were based on outdated and overbroad generalizations about the abilities and proper role of women. Even accepting petitioners' explanation that gender is related to "size, strength, and agility needed to perform police tasks" (Pet. 29),

gender may not be used to weed out applicants for public employment if it is not an accurate "proxy" for the latter, "more germane bases of classification." *Craig* v. *Boren*, *supra*, 429 U.S. at 198. The record assembled in this case refutes any suggestion that women, as a class, are incapable of possessing the traits requisite to effective performance as police officers (Pet. App. 35). The court of appeals thus correctly held that gender-based classification cannot, on this record, be justified by "administrative ease or convenience" in selecting qualified applicants (*ibid.*).

Although the "undisputed facts" (Pet. 35) before the court of appeals supported the conclusion that the gender-based scheme was unconstitutional, the court did not forestall further consideration of the issue on remand. The court reversed the award of summary judgment (Pet. App. 35) and remanded for further proceedings consistent with its opinion (Pet. App. 37). The interlocutory ruling of the court of appeals correctly applied the decisions of this Court and does not warrant further review at this time.

2. The court of appeals also correctly held (Pet. App. 6-9) that Title VII, as amended in 1972, constitutionally proscribes discriminatory employment practices by state and local governments without requiring proof that they are discriminatory in intent. Other courts of appeals have reached the same conclusion [4] and there is no conflict among the circuits to warrant further review.

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[4] See *Scott* v. *City of Anniston*, 597 F.2d 897 (5th Cir. 1979); *United States* v. *City of Chicago*, 573 F.2d 416 (7th Cir. 1978).

The congressional intent to apply "the same Title VII principles * * * to governmental and private employers alike" is clear. *Dothard* v. *Rawlinson*, 433 U.S. 321, 332 n.14 (1977). There is thus no basis for doubting—and petitioners do not dispute—that Congress intended to proscribe employment practices by state and local governments and private employers alike that have a discriminatory, disproportionate impact and did not require proof that challenged practices are discriminatory in intent. See *Griggs* v. *Duke Power Co.*, 401 U.S. 424, 431-432 (1971).

Petitioners contend, however, that Title VII is unconstitutional if, as applied to state and local governments, it does not require proof of discriminatory intent (Pet. 26). Although, as petitioners point out (*ibid.*), this Court has held that state action does not deny equal protection in the absence of discriminatory intent (see *Washington* v. *Davis*, *supra*, 426 U.S. at 238-248), in *Katzenbach* v. *Morgan*, *supra*, the Court held that Congress' authority under Section 5 of the Fourteenth Amendment is not limited to prohibiting state action that independently violates the Constitution. 384 U.S. at 648-649.[5] Instead, Congress may enact such legislation as is reasonably appropriate to enforce the prohibitions of the Amendment. *Id.* at 649-650.[6]

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[5] See also *International Brotherhood of Teamsters* v. *United States*, 431 U.S. 324, 335 n.15 (1977); *Village of Arlington Heights* v. *Metropolitan Housing Development Corp.*, 429 U.S. 252, 271 (1977).

[6] Petitioners argue (Pet. 26) that this Court's decision in *National League of Cities* v. *Usery*, 426 U.S. 833 (1976), indicates that the application of a disproportionate "impact"

In the specific context of employment discrimination and Title VII, congressional findings revealed that extensive discrimination existed in public employment and that many public employment policies extend the unequal results of past official discrimination. S. Rep. No. 92-415, 92d Cong., 1st Sess. 5, 10 (1971); H.R. Rep. No. 92-238, 92d Cong., 1st Sess. 5, 8, 17, 23 (1971). These findings provide a reasonable basis for omitting a requirement that discriminatory intent always be proven (Pet. App. 7-9). The statute aids enforcement of the equal rights mandate of the Amendment by prompting the removal of unjustified employment practices that disproportionally retard minority opportunities.

It would, in any event, be premature for the Court to consider this issue at this time. The case has been remanded for further proceedings in the district court, and the question that petitioners raise now may become moot in the course of these proceedings.

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test to public employment would violate state sovereignty. As the court of appeals recognized (Pet. App. 8), this Court has held that the Fourteenth Amendment abrogated a degree of State sovereignty and authorized Congress to require or prohibit certain state actions to enforce the prohibitions of the Amendment. *Ex Parte Virginia*, 100 U.S. 339, 346 (1879). See also *Fitzpatrick* v. *Bitzer*, 427 U.S. 445, 453-456 (1976). *Usery* did not consider legislation passed pursuant to Section 5 of the Fourteenth Amendment, see 426 U.S. at 852, n.17, and any reliance on it in the context of Title VII is therefore misplaced. See also *Firefighters Institute* v. *City of St. Louis*, 549 F.2d 506, 510 n.5 (8th Cir.), cert. denied, 434 U.S. 819 (1977).

3. Petitioners contend (Pet. 18-24) that the court of appeals erred in concluding that material facts remain in dispute on the question whether the LAPD pre-employment minimum height requirement and physical agility tests are justified by "business necessity."[7] But the evidence on which petitioners rely was plainly disputed;[8] and the facts that evidence sought to establish were plainly material (Pet. App. 16-31).[9] The order remanding the case for findings

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[7] Petitioners also claim (Pet. 24-27) that the disproportionate impact of the LAPD pre-employment height and agility requirements is not sufficient to create a *prima facie* case of discrimination. This contention is insubstantial. Employment practices that exclude (1) 87 percent of adult women and only 20 percent of adult men (height requirement) and (2) 50 percent of adult women and only 3 percent of adult men (agility tests) (see note 1, *supra*) plainly evidence "a significantly discriminatory pattern." *Dothard* v. *Rawlinson*, *supra*, 433 U.S. at 329.

[8] Petitioners sought to prove that the LAPD height and agility requirements are justified by business necessity by means of validation studies that "showed that there was some rational relationship between their selection devices and certain elements of job performance by police" (Pet. App. 21). The accuracy of these studies, however, was contested in counter-affidavits filed by the plaintiffs (Pet. App. 23-25). Moreover, plaintiffs "also introduced evidence of contrary findings of other studies" (*id.* at 25). The court of appeals correctly held that "[v]iewing all this evidence in the light most favorable to appellants, appellees failed to establish that the LAPD's height [and agility] requirement[s] [were] so manifestly job related as to be justified by business necessity" (*id.* at 26; see *id.* at 28).

[9] Nothing in the court's decision requires local police departments to alter local procedures in order to maximize the hiring of women, as petitioners contend (Pet. 16-18). In re-

on the disputed issues of fact is thus correct for the reasons amply stated by the court of appeals (*ibid.*).

4. Petitioners argue (Pet. 30-32) that the court of appeals erred in *United States* v. *City of Los Angeles* in reversing the order enjoining LEAA from suspending federal assistance grants to petitioners. 42 U.S.C. 3766(c)(2)(E) provides that, unless either party to a suit filed by the Attorney General claiming a pattern or practice of discrimination obtains preliminary relief within 45 days after the suit is filed, LEAA is to "suspend further payment of any [law enforcement assistance] funds * * * to that specific program or activity alleged * * * to be in violation of [non-discrimination requirements] * * *." The court of appeals correctly held (Pet. App. 64-68) that petitioners failed to establish that preliminary relief is appropriate in this case.

In particular, petitioners have not demonstrated that they will suffer any irreparable injury in the absence of injunctive relief. Petitioners' suggestion (Pet. 32) that an injunction is necessary to avert

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manding this case for findings of fact on the issue of business necessity, the court of appeals simply invoked this Court's holding in *Dothard* v. *Rawlinson, supra,* 433 U.S. at 332 n.14, that "a discriminatory practice must be shown to be necessary to safe and efficient job performance to survive a Title VII challenge" (see Pet. App. 17). If a discriminatory local practice is not "necessary to safe and efficient job performance," it must be changed to comply with Title VII. In any event, by remanding the case for further proceedings, the court did not determine that any LAPD practices are not "necessary to safe and efficient job performance." That is an inquiry for the district court in the first instance.

"unjustifiable hardship on [the] community" represents simply a factual disagreement with the court of appeals. The court of appeals determined that petitioners' affidavits indicate that "the primary effect of a loss of these funds would be the reassignment of certain officers" (Pet. App. 67 n.7) and concluded that this failed to establish irreparable injury (*id.* at 67). Further review of this factual issue is unwarranted.[10]

Moreover, the court of appeals correctly observed that, because the court reversed the judgment in petitioners' favor in *City of Los Angeles* v. *Blake*, petitioners cannot establish that they will probably succeed on the merits (Pet. App. 66-67). Injunctive relief is therefore not available to petitioners in this case. *E.g.*, *Mason County Medical Association* v. *Knebel*, 563 F.2d 256 (6th Cir. 1977); *Missouri Portland Cement Co.* v. *H. K. Porter Co.*, 535 F.2d 388 (8th Cir. 1976); *Clairol Inc.* v. *Gillette Co.*, 389 F.2d 264 (2d Cir. 1968).[11]

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[10] We do not understand petitioners to claim that injunctive relief should be awarded simply to maintain the "status quo" even if irreparable injury would not result in the absence of an injunction (see Pet. 32). 42 U.S.C. 3766(c)(2)(E) requires the suspension of funding unless grounds for preliminary relief are established. See *United States* v. *Virginia*, 569 F.2d 1300 (4th Cir. 1978).

[11] The court of appeals properly rejected petitioners' claim (Pet. 31-32) that the suspension of funding should be enjoined because the suit filed by the United States violates 42 U.S.C. 3766(b) by requesting a "percentage ratio, quota system, or other program to achieve racial balance" (*ibid.*). The United States has alleged that the City has engaged in

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

WADE H. MCCREE, JR.
Solicitor General

DREW S. DAYS, III
Assistant Attorney General

WALTER W. BARNETT
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Attorneys

SEPTEMBER 1979

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illegal patterns and practices of discrimination (see 42 U.S.C. 3766(c)(2)(E)). The remedy to be awarded will be based on the need to cure the illegal conduct, not on any desire simply to achieve "racial balance." See Pet. App. 65.

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IN THE

Supreme Court of the United States

October Term, 1979
No. 79-54

CITY OF LOS ANGELES, *et al.*, *Petitioners,*

vs.

FANCHON BLAKE, *et al.*, *Respondents.*

CITY OF LOS ANGELES, *et al.*, *Petitioners,*

vs.

UNITED STATES, *Respondent.*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

Brief of Respondents Fanchon Blake, et al., in Opposition.

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On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

Brief of Respondents Fanchon Blake, et al., in Opposition.

Plaintiffs/respondents, FANCHON BLAKE, *et al.*, respectfully request that this Court deny the petition for writ of certiorari, seeking review of the Ninth Circuit's opinion filed in *Blake, et al. v. City of Los Angeles, et al.*, on May 2, 1979. Because the filing of a single petition by defendant CITY OF LOS ANGELES, *et al., is* inappropriate,[1] plaintiffs/respondents respectfully request this Court to consider separately the appropriateness of the writ in each action.

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[1]The filing of a single petition "where several cases are sought to be reviewed on certiorari" is governed by Rule

(This footnote is continued on next page)

Statement of the Case.

The following summation of the facts and procedural history of the case is drawn from the voluminous records and files[2] of *Blake v. City* only[3] and is consistent with the Court of Appeals' opinion therein filed on May 2, 1979 (Appendix "A" to the Petition).

23(5) of the Rules of the Supreme Court. Although the cases herein are "sought to be reviewed on certiorari to the same court" and are related cases (*i.e.*, both the private plaintiffs, who filed suit August 20, 1973, and the government, which filed its action June 2, 1977, challenge discriminatory employment practices of the defendant City of Los Angeles against applicants for sworn positions at the Los Angeles Police Department ["LAPD"]), the opinions of the Ninth Circuit do *not* present or involve "identical or closely related *questions*. . . ." In *Blake v. City of Los Angeles,* ..... F.2d ..... (19 FEP Cases 1441) (9th Cir. 1979), the Court of Appeals applied well-settled principles under Title VII of the Civil Rights Act of 1964 as amended, 42 U.S.C. §§ 2000e *et seq.*, and under Rule 56, Federal Rules of Civil Procedure, and reversed an eve-of-trial grant of summary judgment for the City defendants, remanding the action for trial. In *United States v. City of Los Angeles,* ..... F.2d ..... (19 FEP Cases 1455) (9th Cir. 1979), the Court of Appeals interpreted the automatic fund suspension provision of the Omnibus Crime Control and Safe Streets Act of 1968, 42 U.S.C. § 3766(c)(2)(E) and vacated the District Court's order enjoining the government from pursuing any administrative action regarding employment discrimination by the LAPD and from terminating any funds to the City because of personnel practices of the LAPD.

[2]Because plaintiff/respondents appealed to the Ninth Circuit from the District Court's May 13, 1977 grant of summary judgment without trial as to all issues, and because there were no separate Findings of Fact or Conclusions of Law approved or filed by the District Court (R.4003-4072), there is a massive record underlying the various claims and defenses of the parties. It consists of some 32 affidavits constituting a substantial portion of the 4187-page Clerk's Transcript on appeal, 46 separately filed deposition transcripts, and extensive Stipulations of Fact in the Pre-Trial Conference Order (R.3368-84) as well as innumerable answers to interrogatories and requests for documents filed by the parties during the three and one-half years of preparation for trial.

[3]The facts and procedural history of *United States v. City* are not included for the reasons that the government's

A. Nature of Action.

The action was filed August 20, 1973, challenging sexually discriminatory employment practices in the Los Angeles Police Department ("LAPD") in violation of Title VII of the Civil Rights Act of 1964, as amended (42 U.S.C. §§ 2000e *et seq.*), the Fourteenth Amendment to the United States Constitution, and the Civil Rights Act of 1871 (42 U.S.C. § 1983). The jurisdiction of the District Court was based upon 28 U.S.C. § 1343(3) and (4).

B. Procedural History.

By Order Certifying Class filed June 10, 1976, the plaintiffs/respondents represent a class of women who are past, present and future applicants for, employees in, and retirees from sworn positions in the LAPD (R.1693). On August 6, 1976, defendants/petitioners filed a motion for summary judgment (R.1991 to 2535), the hearing of which was continued by the District Court (R.3086) while the parties continued to prepare all aspects of the action for a November 2, 1976 trial. Due to severe illness, the District Judge on October 21, 1976 ordered all pending motions as well as the pre-trial conference and trial "off calendar" (R.3420), and on January 18, 1977 transferred the entire action to another District Judge for all further proceedings (R.3445). On the eve of the rescheduled pretrial conference date of May 16, 1977 (R.3974), the District Court granted summary judgment on all

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action was filed after the District Court granted summary judgment in *Blake v. City* and in no way bears on the scope or propriety of this Court's review on certiorari of any questions presented in *Blake v. City*.

issues in favor of the City defendants/petitioners (Memorandum Opinion filed May 13, 1977, reproduced as Appendix "B" to the Petition).

C. Factual Background.

Prior to July 1, 1973, the LAPD maintained separate, sex-segregated job classifications in the entry-level police positions and separate lines of progression. While men in the "policeman" classification could perform all assignments and promote through all ranks, women in the "policewoman" classification were limited in assignment to jail matron, desk duty and tasks relating to women and children and were ineligible for promotion above the level of sergeant. Between 1970 and 1973, the LAPD refused to accept applications from women and appointed no women to sworn positions, while accepting 26,759 applications from men and appointing 3,211 men to the entry level "policeman" classification (R. 3376-80).

Beginning on July 1, 1973, the L.A.P.D. established through a new "unisex" ordinance the single entry-level position of "police officer" for both men and women and imposed identical new entry requirements on both male and female applicants (R.3369-74). Nonetheless, by 1976, three years after the "unisex" job classification program had been established, the percentage of women in sworn positions in the LAPD continued to *decline*, from 2.62% in 1970, to 2.15% in 1973, to 2.08% in 1976. During this period, the number of women so employed dropped by 26 (or nearly 15%) while the number of men increased by 816 (or over 12%) (R.3375-79).

The causes of this decline were the minuscule appointment rate for women between 1973 and 1976 (following the total exclusion between 1970 and 1973), as a result of the minimum 5′6″ height and pre-employment physical agility requirements, newly erected as selection standards with the implementation of the "unisex" program in 1973 (R.3371-73). As defendants readily admitted,[4] this minimum height requirement (raised for women from 5′3″ to 5′7″ effective July 1, 1973 and reduced to 5′6″ in July, 1974) had a severe and foreseeable adverse impact upon women[5] and was substantially responsible for the female application rate of only 9.58% for the period 1973 to 1976 (R.3378). The challenged pre-employment "physical agility test" also had a severe and foreseeable exclusionary impact on female applicants, who otherwise passed *every* other stage of defendants/petitioners' selection process (*i.e.*, written test, oral interview, medical exam, background check and personality inventory) at rates substantially equivalent to those of male applicants (R.3381-82).

The only previous physical agility test administered to candidates for sworn positions since 1968 was given solely to "policewoman" applicants in 1969 (none

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[4]Deposition of Muriel Morse, General Manager, City Department of Personnel (dated June 10, 1976) at page 20.

[5]The 5′6″ height standard excludes 87% of all women, and only 20% of all men from applying for the "police officer" job. See the percentile grouping found in *National Center for Health Statistics, Public Health Service, U.S. Dept. of Health, Education and Welfare, VITAL HEALTH STATISTICS, WEIGHT, HEIGHT AND SELECTED BODY DIMENSIONS OF ADULTS, UNITED STATES, 1960-1962,* at 27, Table 2 (Series 11, No. 8) as cited in Note, *Height Standards in Police Employment and the Question of Sex Discrimination: The Availability of Two Defenses for a Neutral Employment Policy Found Discriminatory Under Title VII,* 47 S.Cal.L.Rev. 585, 588 n.13 (1974).

of whom were hired), while defendants hired 4,891 "policeman" applicants between 1968 and 1973 without *any* physical agility requirement (R.3379). The new "unisex" physical agility test excluded 50% of all women but only 2.6% of all men taking the test between 1973 and 1976 (R.3383).

Under the "unisex" program, LAPD also unified its lines of promotion for male and female officers, except that incumbent policewomen had to become "field certified" (*i.e.*, meet the new height and physical agility requirements and certain retraining standards at the Police Academy) in order to promote above the rank of sergeant. By 1976, there were only two female lieutenants, the only women to hold any of the 374 positions above the rank of sergeant (R.3375).

D. Validation Efforts.

In moving for summary judgment in August, 1976, defendants/petitioners submitted by affidavit three newly constructed "validation studies"[6] prepared in anticipation of the November 2, 1976 trial date, certain of which were purportedly based upon a "job analysis"

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[6]The principal studies relied upon were entitled:

(a) "Investigation of Height as a Predictor of Job Performance, Los Angeles Police Department," attached as Exhibit "B" to the Affidavit of William W. Ruch, filed August 6, 1976 (R.1994);

(b) "Major Findings, Los Angeles Police Department Work Sample Study," attached as Exhibit "B" to the Affidavit of Cheryl Mahaffey, filed August 6, 1976; (R..... Transmitted as Non-Reproduceable Document No. 2); and

(c) "Validation of Police Officer Physical Ability Test," attached as Exhibit "A" to the Affidavit of David Friedland, filed August 6, 1976 (R.2193).

A fourth study, "Officer/Suspect Height Differences as a Predictor of Performance on the Bar Arm Control Hold," dated August 26, 1976, was never made a part of the record below.

of the duties and activities of the entry-level police officer.[7]

However, plaintiffs/respondents discovered and developed substantial evidence of defendants/petitioners' prior, repeated and unsuccessful efforts to validate the minimum height requirement.[8] Moreover, with reference to the defendants/petitioners' eve-of-trial validation efforts,[9] each contained major methodological deficiencies which invalidate their findings. The job

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[7]This job analysis was submitted as Exhibit "A" to the Affidavit of Cheryl Mahaffey, filed August 6, 1976 (R..... Transmitted as Non-Reproduceable Document No. 2).

[8]This evidence included:

(a) The study of the "Height-Related Tasks" of police officers (June, 1973) by Dr. Gerald W. Gardner (who developed LAPD's new "unisex" physical agility test), concluding that there was "*no justifiable reason to prevent shorter persons from becoming police officers*" (Deposition of Gerald W. Gardner, dated September 20, 1973, at page 20);

(b) The City Personnel Department's participation in 1973-74 in a statewide validation study of height requirements, conducted by the Selection Consulting Center on behalf of a consortium of over ninety California police agencies and *concluding that minimum height requirements should be eliminated as not job-related* (Deposition of Muriel Morse, dated June 10, 1976, at page 44, and Deposition of Donnell R. Read, dated May 20, 1976, at pages 74-77);

(c) The "Drawn Weapon Frequency Survey" (1974), finding *no correlation between officer height and frequency of drawing a weapon* (Deposition of William Booth, dated August 27, 1976, at page 1 and Exhibit 14); and

(d) The City Personnel Department's study entitled "Relationship Between Height of Police Officers and Complaints, Injuries and Measures of Work Production" (1974), *finding no correlations between height and nine criteria of job performance* (Deposition of Donnell Read, dated May 20, 1976, at pages 52-55 and Exhibit 16) and resulting in the City Personnel Department's recommendation that the Civil Service Commission eliminate the 5'7" minimum height requirement (Deposition of Muriel Morse, dated June 10, 1976, at page 44).

[9]*Supra*, note 6.

relatedness of the selection tests and practices in issue was "not demonstrated in accordance with professionally accepted standards," since the new studies were riddled with deficiencies.[10] These deficiencies include:

(1) *Sample Composition.*[11]

No data for persons shorter than 5'8" or for persons who failed or did not take the physical agility test was analyzed, considered or reported.

(2) *Differential Validity*[12] *and Fairness.*[13]

None of the studies attempted to "differentially validate" either the minimum height requirement or the physical agility test *for women,* or to determine whether, assuming either standard is shown to be job-related for women as well as for men, it is "fair" to apply the standard in the same manner for both men and women.

(3) *Job Tenure and Assignment.*[14]

None of the studies attempted to examine the data and control for the effects of "job tenure"

[10]Affidavit of Dr. James J. Kirkpatrick (R.3583). Each of these deficiencies was specifically discussed by the Court of Appeals (Petition, Appendix "A", pp.23-26).

[11]R.2887-92. *See,* EEOC Guidelines at § 1607.5(b)(1); *Officers for Justice v. Civil Service Commission of San Francisco,* 395 F. Supp. 378, 380 (N.D. Cal. 1975); *Boston Chapter, NAACP, Inc. v. Beecher,* 504 F.2d 1017 (1st Cir. 1974).

[12]R.2883-93. *See,* EEOC Guidelines at § 1607.5(b)(5); *Albemarle Paper Company v. Moody,* 422 U.S. 405, 435-436 (1975); *United States v. City of Chicago,* 573 F.2d 416 (7th Cir. 1978); *LULAC v. City of Santa Ana,* 410 F. Supp. 873, 905-906 (C.D. Cal. 1976).

[13]R.2883-93. *See,* EEOC Guidelines at § 1607.5(b)(5).

[14]R.2888-91. *See,* EEOC Guidelines at § 1607.5(b)(4); *Officers for Justice v. Civil Service Commission of San Francisco, supra,* 395 F. Supp. at 380-381; *Boston Chapter, NAACP v. Beecher, supra,* 504 F.2d at 1025; *LULAC v. City of Santa Ana, supra,* 410 F. Supp. at 904.

or "job assignment," either of which could skew the results.

(4) *Rater Bias.*[15]

Certain of the studies[16] failed to control and correct for "rater bias" against women and against shorter persons, resulting from the use of male LAPD officers as raters, the presence of defendants/petitioners' counsel and the discussion during orientation of the participants of the purpose of the study in the context of the instant lawsuit.

(5) *Multiple Criteria.*[17]

In the various studies, attempts were made to correlate the minimum height requirement with no less than 24 different and discrete criteria of job performance, yet no controls were imposed to insure that the validity findings reported were significant and not merely the result of chance correlations to one of multiple criteria.

E. Availability of Less Discriminatory Alternatives.

Major metropolitan police and sheriff's departments throughout the United States utilize alternative employee selection standards and procedures which have significantly less adverse impact upon female applicants than the minimum height and agility requirements utilized since 1973 by defendants/petitioners, yet result in no impairment in safe and efficient job perform-

[15]R.2891. *See, Albemarle Paper Company v. Moody,* 422 U.S. 405 (1975) at n.32.

[16]*E.g.,* "Major Findings, Los Angeles Police Department Work Sample Study," *supra,* n.6.

[17]Section 14(B)(7) of the "Uniform Guidelines on Employee Selection Procedures," 43 Federal Register 38290 (August 25, 1978).

ance.[18] In the past seven years, minimum height requirements have been voluntarily reduced or eliminated as non-job-related, and without reported impairment of performance, by literally hundreds of law enforcement agencies, large and small, urban and rural.[19]

[18]In September and October, 1976, nineteen depositions were taken of high-ranking police administrators, patrol division commanders, personnel and training directors and female field patrol officers and supervisors at departments throughout the United States. By way of relevant example, the New York City Police Department eliminated its 5'7" standard for men and 5'2" standard for women in 1973, resulting by 1976 in at least 50% of female police officers being below 5'6" (Depositions of Lt. Lucy A. Acerra, dated September 15, 1976, at p.21, and of Sgt. Allan C. Dinnegar, dated October 11, 1976, at p.100). After commanding more than 80 women on patrol assignments in the Bronx, Deputy Chief Anthony V. Bouza concluded that it was not necessary to the "safe and efficient duties of a police officer that he or she be 5'6" in height" and that male and female officers performed "equally and interchangeably." (Deposition of Anthony V. Bouza, dated September 16, 1976, at pp. 41-43 and 90). The Metropolitan Police Department in Washington, D.C., lowered its 5'7" minimum height requirement to 5'0" in June, 1973, resulting by 1976 in at least 60% of the more than 300 women being below 5'7" (Deposition of Claudia Anne Hayes, dated September 21, 1976, at pp. 8 and 25). Former Chief of Police Jerry Wilson concluded that "people under 5'6" can perform all aspects of police work" and that men and women on patrol performed "comparably." (Deposition of Jerry Wilson, dated September 20, 1976, pp. 32-37 and 73).

[19]By the end of 1974, some 152 law enforcement agencies in states other than California were operating and hiring with no minimum height requirement whatsoever or a minimum of 5'0" or less, including the police departments of New York, Washington, D.C., Boston, Dallas, Detroit, Miami, Atlanta, Tucson, Omaha, El Paso, Fort Worth, Kansas City, Memphis, Pittsburgh, Reno and St. Paul and the State Police in Illinois, Ohio and Minnesota. See, Washington, Brenda, *Deployment of Female Police Officers in the United States* (1974), a survey report published by the International Association of Chiefs of Police. Similarly, in the state of California alone, by the end of 1974, fully 95 different law enforcement agencies were operating and hiring with no minimum height requirement, including the Police Departments of San Francisco, San Diego, San Jose, Santa Barbara, Stockton, Palo Alto, San Mateo,

Similarly, hundreds of major law enforcement agencies successfully select, train and deploy sworn personnel without using any *pre-employment* physical agility test,[20] insisting instead upon sound health and administering physical tests following a period of special conditioning and training.

F. Purposeful Discrimination.

It was the avowed and publicly announced policy of the LAPD to eliminate women *per se* from employment in sworn positions. In January, 1971 (and on several subsequent occasions), then Police Chief Edward M. Davis announced that it was his intention to reduce the number of sworn policewomen to a force of twelve (one female matron at each City jail), that women did not belong in police work and that as women retired, their positions would be filled by men.[21] Following the four year hiring freeze on women (1969-73), during which time 3,211 men were hired, LAPD transferred incumbent policewomen to inside secretarial jobs (R.19), raised the height requirement

Barstow, Whittier, Pasadena, Gardena and Covina and the Sheriff's Departments for San Francisco, San Diego, Santa Barbara, Santa Clara, and Fresno Counties. See, *Employment Opportunities in California Law Enforcement*, 1974-75, issued by Commission on Peace Officer Standards and Training, Department of Justice, State of California (R.3826-27).

[20]As of 1975, some 100 such agencies which responded to a questionnaire survey by the International Association of Chiefs of Police reported that no physical agility test was administered in the employee selection process, including the Metropolitan Police Department in Washington, D.C., and the police or sheriff's departments in Boston, Pittsburgh, St. Louis, Indianapolis, Denver, Seattle, St. Paul, Tampa, Kansas City, Knoxville, Ann Arbor, Dayton, Wichita, Albuquerque, San Diego and Sacramento. See, Washington, Brenda, *Deployment of Female Police Officers in the United States* (1974) (R.3828).

[21]Affidavit of Fanchon Blake, filed October 4, 1976 (R. 3362).

for women from 5'4" to 5'7" and erected a new physical agility requirement under the "unisex" program unveiled in July, 1973 (R.3371-73). The LAPD thereupon attempted to continue hiring from all-male eligibility lists in the fall of 1973, until plaintiffs/respondents filed suit and applied for a preliminary injunction against same (R.14-35) and despite Requests for Notification of job opportunities then on file from some 4,500 women (R.20). Beginning in the fall of 1973, defendants/petitioners initiated a practice of "skimming" from the top of short-term eligibility lists (rather than exhausting longer-term lists), thereby giving veterans (and hence males) a far greater percentage of new appointments (R.3447 and 3555). And each year since 1973, the number and percentage of women in sworn positions has continued to decline (R.3375-78).

REASONS WHY THE WRIT SHOULD BE DENIED.

I.
THIS CASE IS NOT RIPE FOR REVIEW BY THE SUPREME COURT.

A. Preliminary Posture of Case.

Defendants/petitioners concede, as they must, in their petition for a writ of certiorari that the "Circuit Court *remanded* [for trial] the portions [of the case] relating to the lawfulness of the City's Police Officer personnel tests [*i.e., all* post-1973 practices], and set forth the . . . legal standards which the District Court *is to apply*." (Emphasis added) (Petition, p.14). Indeed, footnote thirteen in the opinion of the Court of Appeals specifically states in relevant part: "We express no opinion on the question whether appellees *will be able* to make a successful showing of business necessity *at trial*." (Emphasis added) (Petition, Appendix "A", p.26, n.13). Further, the concluding paragraph of the opinion states "[t]he judgment is reversed and the cause is *remanded* to the District Court *for further proceedings* consistent with the views herein expressed." (Emphasis added) (Petition, Appendix "A", p. 37).

Thus, this Court is presented with a request for interlocutory review of a non-final judgment in an action which, but for the instant petition, would be about to go to trial. It is settled law that under such circumstances, the case is not presently ripe for review. In *Brotherhood of Locomotive Firemen & Enginemen v. Bangor & Aroostook R.R.*, 389 U.S. 327 (1967), in a *per curiam* opinion, this Court held as follows at 389 U.S. 328:

"*The Court of Appeals ruled on various legal issues presented to it but remanded* to the District Court to consider whether there had in fact been a contempt and, also, if there was a contempt, whether it was 'of such magnitude as to warrant retention, in part or to any extent, of the coercive fine originally provided for in contemplation of an outright refusal to obey.'

"Petitioners seek certiorari to review the adverse rulings made by the Court of Appeals. However, *because the Court of Appeals remanded the case, it is not yet ripe for review by this Court.* The petition for a writ of certiorari is denied." (Emphasis added).

See also, *Youngstown Sheet & Tube Co. v. Sawyer,* 343 U.S. 579, 584-585 (1952); *Cobbledick v. United States,* 309 U.S. 323, 324-325 (1940); *Hamilton-Brown Shoe Co. v. Wolf Bros. & Co.,* 240 U.S. 251, 258 (1916); and *American Construction Co. v. Jacksonville, T. & K. W. Ry. Co.,* 148 U.S. 372, 384 (1892). The above holding in *Brotherhood* is particularly applicable to the instant case. Indeed on July 16, 1979, or no less than four days subsequent to the filing of the petition herein, counsel for petitioners argued, *on the record* in proceedings in this case before the District Court, to the effect that this case is not even yet ripe for the issuance of a preliminary injunction. The background circumstances to this statement were that on June 28, 1979, plaintiffs/respondents herein filed a motion for a preliminary injunction in the District Court in response to defendants/petitioners' announcement some nine days following the filing of the Court of Appeals opinion that 700 new police officers were about to be selected and hired pursuant

to the same exclusionary requirements in use by the LAPD since 1973. Defendants/petitioners requested a lengthy continuance of the hearing on the motion for a preliminary injunction. At the hearing on the request for a continuance, the following colloquy occurred at pages 4 and 9:

"THE [DISTRICT] COURT: Of course, the case is not finished. *And even if the mandate came down here, it would be remanded to this Court for trial. There has been no trial.*

MR. HUNT [COUNSEL FOR PLAINTIFFS/RESPONDENTS]: There has been a determination by the Ninth Circuit, your Honor, as to several issues that the Plaintiffs are entitled to judgment.

THE COURT: As I read the decision, I don't believe they granted summary judgment for the Plaintiffs in this case.

I granted summary judgment for the Defendants, which they said was not right, because the burden of proof was on the Defendant to prove the job relatedness of the selective process and *there's been no trial on that.*

* * *

MR. BAKER [COUNSEL FOR DEFENDANTS/PETITIONERS]: I think as your Honor correctly characterized it, *we have a long way to go yet*—not the least of which is a consideration of what the appropriate remedies, if any, are going to be in this case once it is returned to this Court." (Emphasis added).

Plaintiffs/respondents submit that since as recent as July 16, 1979, it was defendants/petitioners' position that this case has a "long way to go," to the extent

that it is too early even for the issuance of a preliminary injunction, and since defendant's counsel questioned what relief, "if any," is to be afforded, it follows that this case hardly is ripe for review by the United States Supreme Court. At such time as review of a subsequent final decree herein may be sought and secured, this Court will have the power to reach back and correct any errors in prior interlocutory proceedings below.

B. Impossibility of Meaningful Review.

The problems which this Court would encounter if it were to undertake review of this case in its present procedural posture can be illustrated by concrete examples. The very first question presented (Petition, p.3) and the very first argument made (Petition, p.16) concern an interpretation of three paragraphs of the thirty-seven page Court of Appeals decision. Defendants/petitioners vigorously contend that the writ should be granted because, by these three paragraphs, the Ninth Circuit has held that ". . . Title VII requires the 'modification of [law enforcement] policies' if such modification will enable the department to hire individuals with less physical ability. App. "A", pp. 30-31" (Petition, p.16).

Initially, plaintiffs/respondents note that they disagree with the extreme interpretation put forth by defendants/petitioners as concerns the three paragraphs in question. Notably, the bracketed material (*i.e.*, "[law enforcement]") was inserted by defendants/petitioners and not written by the Court of Appeals. Plaintiffs/respondents submit that these three paragraphs of the Ninth Circuit's opinion mean only that if, on remand, plaintiffs can show that there are alternative non-discriminatory selection standards (not "[law enforcement] policies") which are as job-related as the discriminatory standards being utilized by defendants, then defendants/respondents are required to utilize the non-discriminatory selection standards. This "less discriminatory alternative" principle was among the holdings of this Court in *Albemarle Paper Company v. Moody,* 422 U.S. 405, 425 (1975). Indeed in the Ninth Circuit opinion, the heading above the same three paragraphs is "Availability of Less Discriminatory Alternatives." Further, the first and last sentences of the same three paragraphs read as follows:

> "Even *if* an employer meets his burden of demonstrating business necessity, Title VII plaintiffs *may* prevail *if* they show that alternative selection devices are available that would serve the employer's legitimate interests without discriminatory effects. (*Albemarle, supra,* 422 U.S. at 425.)
>
> * * *
>
> "*So long as non-discriminatory alternatives serve the legitimate interests of the police in safe and efficient job performance,* police departments cannot pursue policies that require the use of selection standards that are themselves prima facie violations of Title VII." (Emphasis added). (Petition, Appendix "A", pp. 30-31).

Under these circumstances plaintiffs/respondents point out the obvious: meaningful review of the Court of Appeals decision concerning the "availability of less discriminatory alternatives" is both inappropriate and impossible at the present juncture. First, neither the decision below when fairly read nor the state of the record raises the first Question Presented in the petition. Second, the question is at best prematurely raised in

the context of potential if not imagined impairment of defendants/petitioners' asserted constitutional right to unfettered discretion in matters of law enforcement policy, since there has been no trial, findings, judgment or relief on the less discriminatory alternative issue. Finally, if this Court were to grant certiorari on this issue at this time, the Court would be presented with the anomalous situation of defendants/petitioners placing one interpretation on a few lines from the opinion below, coupled with an argument that under their interpretation the decision is incorrect, while at the same time the plaintiffs/respondents would be arguing that a different interpretation is more appropriate and that under their interpretation, the decision below is correct, all completely in the abstract in terms of liability or remedy.

Because there are no concrete judically determined facts underlying this statement of the less discriminatory alternative principle, this Court would be required to render an advisory opinion, interpreting the Ninth Circuit's phrasing of same and ruling on its validity completely in a vacuum, without knowing what the actual consequences have been or indeed would be, either in the case before it or in any other case. Among the oldest and most well-established applications of the ripeness principle, itself an adjunct of the "case or controversy" requirement of Article III, Section 2 of the United States Constitution, is the strong proscription against such "advisory opinions." *See, Alabama v. Arizona*, 291 U.S. 286, 291 (1934).

Another example of the impossibility of meaningful review of this case in its present posture concerns defendants' second argument that ". . . the Circuit Court in *Blake* adopted a standard of proof for em-

ployers which *will be* impossible to meet." (Emphasis added). (Petition, p.18). First, as is discussed in Part III, *infra*, the Court of Appeals' standards and validation principles follow the holdings of this Court in *Griggs v. Duke Power Company*, 401 U.S. 424 (1971) and *Albemarle Paper Company v. Moody*, 422 U.S. 405 (1975) and comport well with the application of these principles by other Courts of Appeal. Second, and more importantly as a reason for denying the writ, there is not yet any factual record on the basis of which to review these standards; this entire portion of the case was remanded for trial. Once again, the problem with this argument is that it is premature, and no aspect of post-1973 personnel practices of the LAPD is ripe for review. All of the evidence continues to be a raw, undifferentiated mass of affidavits, depositions, stipulations and documents. Should this Court take this issue at this time for review, defendants/petitioners would be arguing that as a fact certain standards cannot be met, while plaintiffs/respondents would argue that the standards can but have not been met, all completely in the abstract and in advance of any trial below where the standards could be applied to any new evidence of job relatedness as well as to the validation studies and other evidence submitted by affidavit in 1976.

II.

THIS COURT SHOULD NOT REVIEW A VOLUMINOUS RECORD TO RESOLVE FACTUAL DISPUTES IN A CASE REMANDED FOR TRIAL.

Plaintiffs/respondents submit that the basic underpinnings of defendants/petitioners' principal arguments are rooted in an analysis and version of the facts

which is completely at odds with both the facts in the record and the facts as described in the Court of Appeals' opinion.

Firstly, plaintiffs/respondents point out that the "Statement of the Case" prepared and submitted by petitioners (Petition, pp.5-15) as well as the other descriptions of the record found throughout the petition, constitute defendants/petitioners' strained and at times myopic version of the facts in this case and not plaintiffs/respondents' version. More importantly, in the Court of Appeals' opinion, a radically different version of the record is found, explaining perhaps petitioners' repeated references throughout their "Statement of the Case" and entire Petition to the statements and rulings of the District Court. Although plaintiffs/respondents submit that any fair reading of the record shows that defendants/petitioners' version of the record is grossly misleading and at times wholly inaccurate, the more important point is that interlocutory review on certiorari is almost never appropriate "to review evidence and discuss [or determine] specific facts." *United States v. Johnston*, 268 U.S. 220, 227 (1925).

A few examples will suffice to make the point. Perhaps the most striking instance of a total misstatement of undeniable facts concerns the second full paragraph of page 10 of the Petition where, after describing the validation studies relied upon by defendants/petitioners to justify their discriminatory selection devices, the Petition reads:

> "In response to the City's evidence of statistical corroboration of the job-relatedness of height and the physical abilities test, the Plaintiffs submitted the affidavit of their expert, James J. Kirkpatrick, to attest to certain purported methodological de-

> ficiencies. Dr. Kirkpatrick did not take the position that the City's requirements were not job-related (see B.R.3603-04), *nor did he state that the City's validation studies were not professionally acceptable.*" (Footnote omitted). (Emphasis added).

Despite the absoluteness of the above-quoted statement, the affidavit of Dr. Kirkpatrick referred to and found in the record on appeal at pages 3583-87 reads as follows in relevant part:

> "3. Although my preparation for trial has not yet been completed, on the basis of my review of defendants' validation efforts (identified above) and my knowledge of appropriate legal and professional standards governing such validation studies, it is my professional opinion that: (1) each of defendants' studies contain major methodological deficiencies, several of which are common to more than one study; (2) these major deficiencies invalidate the findings of each of those validation studies; and (3) *the job-relatedness of the selection tests and practices at issue in this action has not been demonstrated in accordance with legally and professionally accepted standards.*" (Emphasis added).

Another example of what plaintiffs/respondents consider to be egregious misstatements of the record by defendants/petitioners is found at the paragraph of the petition which begins on page nine and carries over to page ten. Here defendants/petitioners unequivocally assert that their two formal validation studies "demonstrated" job-relatedness of defendants/petitioners' height requirement and physical abilities test. In sharp contrast, the Court of Appeals in discussing these same validation studies stated:

> "*The studies failed to show* that persons shorter than 5'6" (the level of the height requirement) would be more likely to use strong force than taller persons, because no data was reported for persons shorter than 5'6" . . . ." (Petition, Appendix "A", pp. 23-24).

Notably, unreported findings in one of these studies[22] revealed that persons 5'7" are even less likely to use strong force than were persons 5'8" to 5'9" and person 5'10" to 5'11". According to data collected by defendants/petitioners' outside experts, the persons in the sample who were 5'7" in height used "strong force" in only 4.3% of all arrests reported, which is only bettered by persons 6'0" or taller (R.2966 and 3140).

Yet another example of the grossly misleading nature of defendants/petitioners' description of the record is found at pages 10 and 11 of the Petition, where it is stated:

> "Additionally, the Plaintiffs submitted copies of certain City studies, and a number of depositions of individuals from other police agencies relating to performance of women officers who did not meet the City's physical standards.
>
> "The Plaintiffs' depositions demonstrated that other police departments have restructured their policies or their jobs to accommodate shorter and weaker Police Officers. For example. . . ."

In stark contrast to the above-quoted description of the record, the Court of Appeals in discussing this evidence stated:

---

[22] "Investigation of Height as a Predictor of Job Performance," attached as Exhibit "B" to the Affidavit of William Ruch (R.1994).

> "Appellants did not confine their attack to methodological disputes; they also introduced evidence of contrary findings of other studies. They discovered that the City had been involved in four other studies that investigated the relationship of height to job performance by police. *Each of these studies had concluded that height was not significantly related to police job performance.* One of the studies, the "Drawn Weapon Frequency Survey," had found no correlation between police officer height and the frequency of drawing a weapon. This finding directly contradicted appellees' contention that shorter officers are more likely to use strong force, particularly force stronger than the bararm control hold. *They also produced numerous depositions from police officials in other major American cities that have reduced or eliminated minimum height requirements for police. This testimony indicated that persons under 5'6" in height can, and are, safely and efficiently performing all aspects of police work.*" (Emphasis added). (Petition, Appendix "A", pp.25-26).

Plaintiffs/respondents do not bring these evidentiary inaccuracies in the petition to the attention of this Court for idle reasons. The point is that defendants/petitioners' version of the facts set forth in their petition is the vital underpinning to the legal arguments made throughout the petition. When the Ninth Circuit opinion is read, however, and the facts as therein recited are taken into account, the arguments of defendants/petitioners must fail under the legal analysis set forth in the opinion of the Court of Appeals.

Under these circumstances, and aside from any dispute between the parties as to the true facts, defendants/

petitioners are in reality asking this Court to review the extensive record in this case and to determine the accuracy of the Ninth Circuit's version of the facts. Plaintiffs/respondents respectfully submit that reviewing an extensive record to determine which version of the facts is accurate is not an appropriate function of the United States Supreme Court. There can be no doubt but that were this Court to assume the burden of reviewing this case in its present posture, each Justice would be required to analyze the entire approximately 10,000 page record[23] in order to pass upon the Questions Presented by defendants/respondents in their petition seeking prior to trial the interlocutory review on certiorari of the opinion of the Ninth Circuit Court of Appeals.

III.

THE NINTH CIRCUIT'S DECISION ON TEST VALIDATION COMPORTS WITH THIS COURT'S PRIOR DECISIONS AND IS CONSISTENT WITH CASE LAW IN OTHER CIRCUITS.

Although plaintiffs/respondents argue above that the appropriateness of the Ninth Circuit's legal analysis of the requirements of "business necessity", "job-relatedness," and "validation" is not ripe for review, the writ should also be denied because there is no conflict between decisions of the sort contemplated by Rule 19 (1)(b) of the Rules of the Supreme Court. The careful legal analyses throughout the opinion of the Court of Appeals are, in each and every instance, based on the sound and settled precedents of this Court. For this reason, plaintiffs/respondents will not respond point by point to each of the contentions made in

[23]See n.2, *supra.*

the petition. Instead, a few specific responses should suffice.

Defendants/petitioners strenuously criticize (Petition, pp.19-20) the Ninth Circuit's reliance upon the Guidelines of the Equal Employment Opportunity Commission on Employee Selection Procedure, 28 C.F.R. § 1607 ("EEOC Guidelines"). Indeed, defendants/petitioners go so far as to assert that the Circuit Court's various statements on validation, job-relatedness, and business necessity, which without exception were based upon provisions of the EEOC Guidelines and were set forth to guide the District Court upon remand of these issues for trial, "will limit or eliminate personnel testing in the Ninth Circuit."

The short and simple answer to this argument is that it ignores the precise holding of this Court in *Albemarle Paper Company v. Moody*, 422 U.S. 405, 431 (1975), made over four years ago, and the holding of this Court in *Griggs v. Duke Power Company*, 401 U.S. 424, 433-34 (1971), made over eight years ago, that the EEOC Guidelines are "entitled to great deference". Since this has been the law of the land for almost a decade, followed by countless decisions of the various Courts of Appeal,[24] plaintiffs/respond-

[24]*United States v. City of Chicago*, 573 F.2d 416 (7th Cir. 1978); *EEOC v. Detroit Edison Co.*, 515 F.2d 301 (6th Cir. 1975); *Rogers v. International Paper Co.*, 510 F.2d 1340 (8th Cir. 1975); *Kirkland v. New York State Dept. of Correctional Services*, 520 F.2d 420 (2d Cir. 1975), cert. den. 429 U.S. 823 (1976); *Douglas v. Hampton*, 512 F.2d 976 (1975); *Boston Chapter, NAACP, Inc. v. Beecher*, 504 F.2d 1017 (1st Cir. 1974); *United States v. Georgia Power Co.*, 474 F.2d 906 (5th Cir. 1973); *Harper v. Mayor and City Council of Baltimore*, 359 F. Supp. 1187 (D.Md. 1973), aff'd on other grounds, ... F.2d ..... (4th Cir. 1973).

ents suggest that defendants/petitioners' "doomsday" argument is without foundation.

In a similar vein, defendants/petitioners vigorously argue (Petition, pp.21-24) that the Ninth Circuit's rejection of a "rational relationship" standard for showing job relatedness and insistence upon the "professionally accepted methods" standard, was inapproporiate and in conflict with prior decisions of this Court and of certain other circuits. Again, the dispositive response is that in *Albemarle Paper Company v. Moody*, 422 U.S. 405, 431 (1975), this Court unequivocally stated:

> ". . . discriminatory tests are impermissible unless shown, *by professionally acceptable methods*, to be 'predictive of or significantly correlated with important elements of work behavior which comprise or are relevant to the job or jobs for which candidates are being evaluated. 29 C.F.R. § 1607.4(c) [EEOC Guidelines]." (Emphasis added)

Defendants/petitioners also contend (Petition, p. 23) that it is not enough for the plaintiffs in a Title VII case to point out "methodological defects", but further that the burden should be on the plaintiffs to prove "actual harm to the usefulness of the study" resulting from the methodological defects. Again this argument is at odds with the approach taken by this Court in *Albemarle Paper Company v. Moody*, 422 U.S. 405, 423-433 (1975). Here, after the validation study was found to be inadequate due to methodological defects, this Court stated:

> "[t]here is, in short, *simply no way to determine* whether the criteria *actually* considered were sufficiently related to the Company's legitimate interest in job-specific ability to justify a testing system

> with a racially discriminatory impact." (First emphasis added; second in original). 422 U.S. at 433.

Plaintiffs/respondents submit that the immediately above-quoted language hardly comports with defendants/petitioners' position that a showing that a validation study not done according to "professionally acceptable methods" nevertheless can be used to legally justify a discriminatory selection device.

Similarly, there is simply no validity to defendants/petitioners' argument that, contrary to the instant decision by the Ninth Circuit, five circuits have approved a demonstration of job-relatedness by a "rational relationship" showing "other than formal validation studies." (Petition, p.22). A close reading of the cited cases shows that the holdings merely were that job-relatedness had been shown; in none of the cases is there either an express or implied rejection of the "professionally accepted methods" standard which, as noted above, was adopted by this Court in *Albemarle, supra* at 431. Moreover, defendants/petitioners fail to cite cases, which are legion in all circuits,[25] which do expressly apply the *Albemarle* principle.

Finally, defendants/petitioners argue (Petition, pp. 24-27) that the Circuit Court below was incorrect in its holding that when a selection device has "adverse impact," the burden shifts to prove job-relatedness even when the adverse impact showing "is not probative of *intentional* discrimination." This issue, of course, was long-ago settled by this Court in *Griggs v. Duke Power Company*, 401 U.S. 424, 432 (1971), where it was held:

---

[25]See cases cited in note 24, *supra*.

". . . good intent or absence of discriminatory intent does not redeem employment procedures or testing mechanisms that operate as 'built-in headwinds' for minority groups and are unrelated to measuring job capability."

As this Court more recently stated in *Washington v. Davis*, 426 U.S. 229, 246-247 (1976):

"*Under Title VII*, Congress provided that when hiring and promotion practices disqualifying substantially disproportionate numbers of blacks are challenged, *discriminatory purpose need not be proved*, and that it is an *insufficient response to demonstrate some rational basis for the challenged practices.*" (Emphasis added).

See also, McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802-806 (1973); *General Electric Co. v. Gilbert*, 429 U.S. 125 (1976); and *Teamsters (IBT) v. United States*, 431 U.S. 324 (1977).

In *Dothard v. Rawlinson*, 433 U.S. 321 (1977), this Court applied the "disparate impact" standard to minimum 5′2″ height and 120 pound weight requirements for prison employees, utilized by the state of Alabama Board of Corrections. This Court held that the statistically established exclusion of female applicants was a *prima facie* violation of Title VII, *without* proof of purposeful discrimination. Importantly, this Court in *Dothard* further specifically rejected the state employer's claim that minimum hiring standards of public employers set by statute should be afforded "greater deference than is typically given private employer-established job qualification," concluding that:

"The relevant legislative history of the 1972 amendments extending Title VII to the States as

employers does not, however, support such a result. Instead, *Congress expressly indicated the intent that the same Title VII principles be applied to government and private employers alike.* See H.R. Rep. No. 92-288, 2d Cong., 1st Sess. p.17 (1971); S. Rep. No. 92-415, 92d Cong., 1st Sess. p.10 (1971). See also *Schaeffer v. San Diego Yellow Cabs*, 462 F.2d 1002 (CA9). *Thus for both private and public employers, "The touchstone is vate and public employers, 'The touchstone is business necessity,'" Griggs*, 401 U.S., at 431. (Em-

Conclusion.

For the reasons and upon the authorities discussed above, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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IN THE

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Supplemental Brief of Respondents Fanchon Blake, et al., in Opposition.

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I
Introduction.

Pursuant to Supreme Court Rule 24(5), this Supplemental Brief is filed to bring to this Court's attention the fact that Defendant-Petitioner City of Los Angeles ("Petitioner City") very recently has made legal and factual assertions in the District Court below relevant to the ripeness of this case for review by this Court. These assertions made below are *precisely and unequivo-*

cally inconsistent with *crucial and central* arguments and assertions made by Petitioner City to this Court in support of its Petition.

Respondents Fanchon Blake, *et al.* ("*Blake* Respondents") do not bring these facts to this Court's attention for purposes of embarrassing Petitioner City or its attorneys. Rather, this Supplemental Brief is filed because Petitioner City's arguments and assertions recently made in this case to the District Court below show beyond any question whatsoever the validity the contentions previously made by the *Blake* Respondents in their brief in opposition to the petition for certiorari, dated August 10, 1979. Petitioners' arguments below also show the patent invalidity of the Petitioner City's arguments and assertions made to this Court in its Petition for Certiorari and in its Reply Brief in support of that Petition.

II

Factual and Procedural Background.

In a decision herein dated May 2, 1979 and reported at 595 F.2d 1367, the Ninth Circuit Court of Appeals ruled that Petitioner City's employment practices in effect prior to July, 1973 violated both Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §2000e *et seq.* and the Fourteenth Amendment to the United States Constitution. As to the post July, 1973 practices, the Court of Appeals ruled that the District Court in this action had improperly granted a motion for summary judgment for the defendants and remanded the case for proceedings consistent with the appellate opinion.

On or about July 12, 1979, Petitioner City filed a petition for certiorari in which Petitioner City an-

ticipated arguments concerning the ripeness of this case for review to be made by the *Blake* Respondents and Respondent United States in the companion case. More particularly, in the Petition it was vigorously and repeatedly argued that although major aspects of the case were not at final judgment, and indeed had been remanded for trial, the Supreme Court nevertheless should grant certiorari because the "legal standards" set forth to be applied on the remand were "fundamental" to the subsequent proceedings, and because those standards were "impossible to meet" and "appear to signal the deathknell of this action." (Petition, pp. 18-19.)

In response to these arguments, in a brief submitted to this Court on or about August 10, 1979, the *Blake* Respondents argued that the case was not ripe for review despite the "deathknell" contentions of the Petitioner City. Citing *Brotherhood of Locomotive Firemen and Enginemen v. Bangor & Aroostook R.R.*, 389 U.S. 327 (1967), the *Blake* Respondents' basic contention was that the case was not ripe for review until the Courts below had had a trial on the merits and applied the legal standards enunciated by the Court of Appeals to the facts as found by this District Court. It further was pointed out that until findings of fact had been made, this Court would be required to sift through a record which literally exceeds 10,000 pages in order to make meaningful determinations in this case.

In a reply brief filed in September, 1979, the Petitioner City characterized the *Blake* Petitioners' ripeness arguments as "specious." (Reply Brief, p. 4.)

In the meantime in June, 1979 the *Blake* Petitioners (Plaintiffs below) filed a motion for a preliminary injunction in the District Court. That motion was heard

by the District Court on December 17, 1979 and denied on December 18, 1979. The denial by the District Court is now on appeal.

The *Blake* Respondents submit the instant brief in order to put before this Court certain relevant statements and arguments made by Petitioner City (Defendant below) in opposition to the motion in the District Court for a preliminary injunction. In summary, all of these statements and arguments made by Petitioner City are to the effect that the Ninth Circuit's opinion is not the "deathknell" of this action, that the standards set forth by the Ninth Circuit will not be "impossible to meet" and, indeed, that at a trial on the remand the standards set forth in the Court of Appeals decision in reality are not "legal standards" to be followed by the District Court.

III
"Deathknell" Arguments.

In the Petition for Certiorari Petitioner City stated as follows at page eighteen:

> "In holding that the City had not met this burden of proving the lawfulness of its height requirement and physical abilities test, the Circuit Court in *Blake adopted a standard of proof* for employers which will be impossible to meet. That burden appears to signal the deathknell of this action. . . ." (Emphasis added.)

Similarly in its Reply Brief filed in September, 1979, Petitioner City argued as follows at pages seven and eight:

> ". . . [I]t is critical to focus on the actual substance of the Circuit Court's decision. . . .

> [T]he Circuit Court discussed in detail the legal standards it considered applicable to this case and *concluded* that the evidence presented by the City was insufficient to demonstrate the business necessity for its post-1973 selection devices. . . . Such an opinion lends little, if any, support to the claim that this case is not ripe for review." (Emphasis in original.)

In precise contradiction to the above-quoted statements to this Court, it was argued as follows at pages seven through nine of Petitioners recent Memorandum submitted below in opposition to the motion for a preliminary injunction ("Petitioners' Memorandum below"):

> *"Little Likelihood of Prevailing as to Post 1973 Use of Challenged Selection Devices*
>
> "The City has consistently argued that the basically interlocutory nature of this case would not prevent the United States Supreme Court from being able to engage in a meaningful review of the legal issues discussed at length by the Ninth Circuit Court of Appeals. But *this does not mean that the City has in any sense conceded that the Plaintiffs have, by virtue of the Ninth Circuit opinion, prevailed on the overriding issue* of whether the City's selection devices are so manifestly job related as to constitute a business necessity.
>
> * * *
>
> "The starting point for determining whether the Plaintiffs have met their heavy burden of demonstrating a likelihood of success on the merits is certainly the evidence previously filed in this action. . . . *Suffice it to say that the City contends that the evidence it has already introduced is*

compelling enough that it should not be concluded that the Plaintiffs even have a fair chance of ultimately prevailing." (Emphasis added.)

The *Blake* Respondents submit that since the Petitioner City's position now is that "it should not be concluded that the Plaintiffs *even have a fair chance* of ultimately prevailing," their prior arguments, that "the Circuit Court's legal standards appear to signal the deathknell of this action" and "will be impossible to meet," are arguments which should be rejected by this Court in its consideration of the ripeness of this case for review.

IV

"Fundamental Legal Standards" Arguments.

In its Reply Brief to this Court, Petitioner City argued as follows at pages four through seven:

> "The Respondents' principal point is that this case technically involves a non-final judgment because the Circuit Court remanded the matter, and therefore, it is not ripe for review. But the phrase, 'remanded for further proceedings' is not magical, and its utterance certainly does not per se preclude review. This Court has long held that the absence of finality will not foreclose it from reviewing a case where the issues presented are 'fundamental to the further conduct of the case.' *Land v. Dollar*, 330 U.S. 731, 734, n.2 (1947). . . .
>
> * * *
>
> "There is no doubt that the issues raised here *call into question the very legal standards* which have been applied to the extensive evidentiary record in this case and *which would have to be followed if the case was simply returned*

> *to the trial court* without further review. Thus, those issues are *clearly fundamental* to the further processing of this case. . . .
>
> * * *
>
> "That this case is now ripe for review is further underscored by the fact that neither the District Court nor the Circuit Court had any difficulty in dealing with the factual record in this case. Contrary to the suggestions of the Respondents, neither of the lower courts expressed the view that there were remaining disputes as to material facts in the current record which could pose obstacles to meaningful review." (Emphasis added.)

Despite the unequivocal nature of the above-quoted statements made to this Court, in the District Court in Petitioners' Memorandum below it recently was stated as follows at page eight:

> "As is commonplace in this often complex and highly technical area of the law, the Plaintiffs [in the Court of Appeals] raised a number of criticisms regarding the evidence produced by the City. As is proper when reviewing a summary judgment, *the Appellate Court basically considered only the arguments made by the Plaintiffs* and viewed all of the extensive evidence in the record in the light most favorable to the Plaintiffs, and thereby concluded that, for purposes of a summary judgment, the height requirement and physical abilities test have not been shown to be justified by business necessity. (*See, Blake* opinion, p. 2, lines 12-16; p. 16, lines 3-17; p. 22, lines 29-32; and p. 24, lines 1-4.) *Obviously, this* [District] *Court would not assess the evidence presented according to such uneven standards of review.*

Moreover, the City contends that a balanced examination of the evidence already filed and the evidence submitted herewith should persuade this Court that the facts are such as to establish that the challenged selection devices are so closely job related as to constitute a business necessity." (Emphasis added.)

The *Blake* Respondents submit that since the Petitioner City's position *presently* is that a "balanced examination" of the facts upon the remand will "establish that the challenged selection devices are so clearly job-related as to constitute a business necessity," this case is hardly ripe for review on the ground that, as Petitioner City previously argued to this Court, there are no "remaining disputes as to material facts." The *Blake* Respondents further submit that since Petitioner City's position presently is that the Ninth Circuit in its opinion did not set forth "legal standards," but rather "considered only the arguments made by the Plaintiffs," this case is hardly ripe for review on the ground that, as Petitioner City previously argued to this Court, the "legal standards" set forth in the Ninth Circuit Opinion "are fundamental to the further conduct of the case."

V
New Evidence.

Before the District Court below, Petitioner City recently has submitted evidence on the issue of the job-relatedness of its employment selection devices which was not before the Court of Appeals and is not in the record before this Court. In Petitioners' Memorandum below, this new evidence was described in detail at pages nine to eleven. At the conclusion of

this description, Petitioner City stated as follows at page eleven:

> "Based upon the evidence already in the record *as well as the evidence produced in response to this motion,* the City contends that the Plaintiffs have clearly failed to meet their heavy burden of showing that they are likely to prevail on the merits. This Court should find that in light of the material presented to date, *the Plaintiffs' criticisms of the City's evidence are more apparent than real,* and that the City's evidence clearly appears to establish that the height requirement and physical abilities tests are so manifestly job related as to constitute a business necessity." (Emphasis added.)

The "new" evidence as to job-relatedness and business necessity filed in the District Court constitutes several purported validation studies and other evidence not in the Record on Appeal. These purported validation studies and other new evidence submitted to the District Court are voluminous.

Although the *Blake* Respondents believe the new validation evidence to be inadequate as a matter of law, the fact that Petitioner City has done what purports to be new validation work which is not before this Court means that if this Court were to take the case, it would be rendering an advisory opinion. This is the case because without the new evidence being in the record, the decision of this Court cannot be based upon the complete record in this case and thus would not be dispositive of the case. The *Blake* Respondents further would point out that it would not be practicable to make the new evidence part of the record before this Court for the simple reason that the new evidence

has not yet been reviewed or considered by the Court of Appeals or, indeed, as a final matter by the District Court.

VI
Blake Respondents' Position Regarding Ripeness for Review.

The *Blake* Respondents wish to make it clear that they do not agree with all of the extreme positions taken by Petitioner City in the District Court as to the meaning of the Court of Appeals decision herein or the likelihood that Respondents ultimately will succeed on the merits. The *Blake* Respondents nevertheless submit that the positions taken below by Petitioner City show that the *Blake* Respondents were entirely correct in their arguments as to ripeness made in their Brief filed in August, 1979 in opposition to the Petition for Certiorari. In that Brief it was pointed out that:

(a) In the absence of findings of fact and an application of those facts to the relevant legal principles as a final matter, meaningful review is not possible at this juncture of the case because this Court would be deciding legal issues in a vacuum;

(b) The basic argument made in the Petition for Certiorari, to wit that the "legal standards" in the Ninth Circuit opinion are "impossible to meet," is at this juncture completely unsupported as a factual matter by the record as it now stands;

(c) A review by this Court should await introduction of any new evidence of job-relatedness which might be introduced in the District Court below;

(d) A review by this Court at this juncture would require the nine Justices of this Court to sift through the undifferentiated mass of evidence

in the Record on Appeal which exceeds 10,000 pages in length.

The *Blake* Respondents also would point out that, unlike the Petitioner City, there is no inconsistency between their positions taken in this Court and their positions before the District Court on the motion for a preliminary injunction. All that was argued below was that, considering the balancing of hardships and the likelihood of success on the merits, the represented class is entitled to a preliminary injunction pending trial and final judgment. There is nothing inconsistent in that argument with the argument that the Supreme Court of the United States should not review a case which has not been to trial, in which there are no findings of fact, in which the Supreme Court would be required to decide legal issues in a vacuum, and in which the Supreme Court would have to review a massive record on appeal.

VII
Conclusion.

The *Blake* Respondents respectfully submit that any doubts there may have been as to whether this case is ripe for review in its present posture are dispelled by the positions taken and arguments made so recently by Petitioner City in the District Court.

Respectfully submitted,

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IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1979
No. 79-54

CITY OF LOS ANGELES, et al.,
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CITY OF LOS ANGELES, et al.,
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vs.

UNITED STATES,
Respondent.

REPLY BRIEF FOR THE PETITIONERS, THE CITY OF LOS ANGELES, ET AL.

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Respondent.

REPLY BRIEF FOR THE PETITIONERS, THE CITY OF LOS ANGELES, ET AL.

The Petitioners, the City of Los Angeles, et al., (hereinafter, "City"), filed a single petition for a writ of certiorari pertaining to the cases of Blake, et al. v. City of Los Angeles, et al., and the United States v. City, et al. While recognizing that the time for consideration of the petition may now be short, the City believes it is necessary to reply briefly to the oppositions filed in these matters.[1/]

Despite a lengthy and detailed Circuit Court opinion and a record resulting from nearly six years of aggressive litigation, the Respondents principally argue regarding the Blake case that it is not ripe for any type of meaningful review. The City contends that the state of the record and the Circuit Court opinion are such that a thorough examination of the legal issues presented in this case is not only possible, but essential at this time.[2/]

Regarding United States v. City, et al., the Respondent erroneously perceives the case as presenting simply a factual question which is not appropriate for review. To the contrary, that case raises an important issue of law concerning the statutory power of the federal courts under the Omnibus Crime Control and Safe Streets Act of 1968.

1/ The City's Petition was filed on July 12, 1979 and the United States' opposition was not received until September 17, 1979.

2/ There is another case now pending before the Court which raises issues which are identical to some of the issues presented in the instant case. See, City of Anniston, Alabama, et al. v. Mack Scott, et al., No. 79-390.

THE LEGAL QUESTIONS RAISED IN BLAKE v. CITY CAN AND MUST BE ADDRESSED AT THIS TIME

The City submits that a careful reading of the opposition briefs reveals a misplaced reliance on general rules regarding the need for finality and a series of specious attempts to create the impression that this case is such a factual maze that the Court cannot meaningfully review the important legal issues that are raised.

The Respondents' principal point is that this case technically involves a non-final judgment because the Circuit Court remanded the matter, and therefore, it is not ripe for review. But the phrase, "remanded for further proceedings" is not magical, and its utterance certainly does not per se preclude review. This Court has long held that the absence of finality will not foreclose it from

reviewing a case where the issues presented are "fundamental to the further conduct of the case." Land v. Dollar, 330 U.S. 731, 734, n.2 (1947); Larson v. Domestic and Foreign Commerce Corp., 337 U.S. 682, 685, n.3 (1949). Moreover, it is firmly established that the purpose of the finality rule is to "promote[] judicial efficiency and [to] hasten[] the ultimate termination of the litigation." United States v. Nixon, 418 U.S. 683, 690 (1974).

There is no doubt that the issues raised here call into question the very legal standards which have been applied to the extensive evidentiary record in this case and which would have to be followed if the case was simply returned to the trial court without further review. Thus, those issues are clearly fundamental to the further processing of this case. Indeed, the issues presented for

review in the instant case are fundamental to the further conduct of innumerable employment discrimination suits.

Moreover, a clarification of these legal issues could either remove the need for a trial or substantially shorten the length of time required for further proceedings. The result would be tremendous savings in terms of time and resources for the judiciary, the litigants, and the public. Thus, the purposes underlying the finality rule would be well served by review at this time.

That this case is now ripe for review is further underscored by the fact that neither the District Court nor the Circuit Court had any difficulty in dealing with the factual record in this case. Contrary to the suggestions of the Respondents, neither of the lower courts expressed the view that there were remaining disputes

as to material facts in the current record which could pose obstacles to meaningful review.

In that regard, it is critical to focus on the actual substance of the Circuit Court's decision. It determined that the City had violated the Equal Protection Clause of the Fourteenth Amendment for the period prior to March 24, 1972. The Circuit Court determined that the City had violated Title VII for the period between March 24, 1972 and July 1, 1973. Finally, the Circuit Court discussed in detail the legal standards it considered applicable to this case and concluded that the evidence presented by the City was insufficient to demonstrate the business necessity for its post-1973 selection devices. (Appendix A to Petition, p. 2, p. 18, and p. 26, n.13.) Such an opinion

lends little, if any, support to the claim that this case is not ripe for review.

In reality, the Blake Respondents recognize the importance of the Circuit Court's opinion. They make reference in their brief to certain recent proceedings before the United States District Court with respect to their motion for a preliminary injunction. (Opposition Brief, pp. 14-16.) The significance for present purposes of those proceedings is that in seeking an injunction, the Respondents maintained that in the wake of the Circuit Court's decision they were presently entitled to the extreme remedy of an order which not only directs the Los Angeles Police Department to hire, but mandates that the hiring be done on a quota basis. As Mr. Hunt, the longtime attorney for the Respondents, stated

on the record:

> "The basic point is that judgment has been determined by the Ninth Circuit for the Plaintiffs, and it's time to get about making up for that mass discrimination." (Emphasis added.) (Tr., July 16, 1979, p. 8, lines 8-10.)

In short, the Respondents' attempts to discourage this Court from granting certiorari do not withstand analysis. It is clear that the legal status of this case and the condition of the factual record provide a firm foundation for a critical review of the legal issues that were addressed with such specificity by the Circuit Court. Such a review is not only possible, but is of vital importance to local governments and law enforcement agencies throughout this country.

THE CASE OF U.S. v. CITY PRESENTS AN IMPORTANT LEGAL ISSUE REGARDING THE SCOPE OF THE DISTRICT COURT'S POWER TO ISSUE PRELIMINARY RELIEF

In opposing the City's petition, the

the United States merely assumes that under 42 U.S.C. § 3766(c)(2)(E) a federal court is limited to determining whether the party has satisfied the stringent traditional requirements for the issuance of a preliminary injunction. Thus, the Respondent argues that since the Circuit Court determined there was no adequate showing of irreparable injury, any further review would involve simply a factual issue. The Respondents' opposition begs the question presented in this case.

The City's contention is that the Circuit Court and the Respondent have far too narrowly defined the power of the federal courts under § 3766(c)(2)(E). That section provides that the courts may grant "such preliminary relief with regard to the suspension or payment of funds as may be otherwise available by law. . . ." (Emphasis added.) The phrase "preliminary

relief" is broad and should be interpreted to permit the federal courts to issue such orders as are appropriate and necessary under the circumstances.

When the district court in this case issued its order against the suspension of federal funds, the City had already been granted summary judgment in Blake v. City. Twenty days later the federal government filed suit against the City of Los Angeles raising several of the same claims that had been resolved in favor of the City in Blake. The court found that it was necessary to stay the United States' action pending complete appellate review of its decision in Blake, not only because certain of the allegations were identical, but because a determination of the various legal issues involved would have a direct and substantial impact on the court's handling of the litigation before it.

Thus, the court's stay was not only appropriate but necessary in order to efficiently and effectively control the highly complex proceedings.[3/]

At the time of the stay order the court had before it uncontradicted evidence that the termination of federal funds would disrupt an on-going and effective program aimed at the control of juvenile gang violence. The court determined that under the circumstances it would halt the suspension of federal funds in order to maintain the status quo and avoid harm to the City's programs until such time as the stay could reasonably be lifted and proceedings with respect to the merits of the United States' case could

---

3/ The propriety of that stay order was not challenged by the United States on appeal.

be resumed. The City maintains that this was an appropriate exercise of the broad power granted to the federal courts under § 3766(c)(2)(E). Since this Court has not addressed the issue of the scope of the federal courts' power under that section, the City urges it to accept this case for review.

CONCLUSION

For all of the foregoing reasons and the arguments contained in its Petition, the City urges that a writ of certiorari issue to review the judgment and decisions of the United States Court of Appeals for the Ninth Circuit in these cases.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

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Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF OF THE CITY OF HOUSTON, TEXAS, AS AMICUS CURIAE IN SUPPORT OF THE PETITION

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BRIEF OF THE CITY OF HOUSTON, TEXAS, AS AMICUS CURIAE IN SUPPORT OF THE PETITION

INTRODUCTION

The City of Houston, Texas, files this brief as *Amicus Curiae*, pursuant to the fourth paragraph of Rule 42 of the Rules of the Supreme Court of the United States, to urge that this Court grant the Petition by

the City of Los Angeles, California, for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit to review that Court's decision in the case styled *Blake v. City of Los Angeles.*

STATEMENT OF INTEREST

Like the Petitioner City of Los Angeles, the City of Houston is an employer as defined by Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. Section 2000e(b), and is subject to the restrictions which that statute places on its employment practices. As a municipality, the City of Houston has a compelling governmental interest in providing police services to its community and seeks to promote the safety of persons and property by maintaining an efficient and effective police force. After a team of industrial psychologists conducted a validation study of its entrance standards, the Houston Police Department temporarily suspended its minimum height requirement for applicants, pending further study of its job-relatedness. Before the City of Houston could lawfully act on the results of such study, it believes that this Court should clarify the standard of proof necessary for a public employer to show the job-relatedness and business necessity of a particular employment practice and should determine whether such practice may be "validated" only in the specific ways prescribed by regulations of the Equal Employment Opportunity Commission (EEOC). Based on the reasoning of the Ninth Circuit in *Blake v. City of Los Angeles,* the City of Houston would be virtually unable to show the business necessity of any employment requirement which had a statistical adverse impact on any protected group under Title VII. Thus, the effective result must be that an employer can

seldom, if ever, implement any employment standard in face of a statistical adverse impact, however rationally related it may be to a particular job.

HISTORY OF THE CASE BELOW

This case arose as a sex discrimination suit challenging certain employment policies of the Los Angeles Police Department. The district court granted defendants' motion for summary judgment, holding that the City's separate classifications of "Policeman" and "Policewoman" prior to March 24, 1972, (the date Title VII was extended to cover municipal employers) did not violate the equal protection clause of the Fourteenth Amendment; that the temporary continuation of the dual classification for the period from March 24, 1972 to June, 1973, did not violate Title VII because this transition period was reasonably justifiable as a business necessity; and that the newly adopted requirements existing after June, 1973, were lawful under Title VII because of their clear job-relatedness. *Blake v. City of Los Angeles,* 435 F.Supp. 55 (C.D. Cal. 1977). On appeal to the United States Court of Appeals for the Ninth Circuit, that court reversed the district court's holdings on these three points. ____F.2d____ (Slip opinion, May 2, 1979).

This Amicus believes that the reversal on all three points was erroneous. However, because of the overwhelming importance of the Appeals Court's holding on the standard of proof for "job-relatedness" and "business necessity" under Title VII as a continuing concern to employers, this Amicus brief will be limited to that issue alone, in the interest of brevity.

REASON FOR GRANTING THE WRIT

This Court should clarify the meaning of "job-relatedness" and "business necessity" as legal standards under Title VII.

In the proceedings before the district court, the defendants offered substantial evidence in the form of a professional validation study in support of the challenged entrance requirements, adopted in June, 1973, for the Los Angeles Police Department. These included a minimum height requirement of 5′ 6″ and a physical abilities examination designed to test physical endurance, strength, and agility. The two requirements, as the district court recognized, "imposed a severe adverse impact upon women." *Blake v. City of Los Angeles,* 435 F.Supp. 55, 62 (C.D. Cal. 1977). Nevertheless, that court concluded that the requirements met the legal standards of Title VII because of defendants' proof of job-relatedness. Plaintiffs' objections that this proof did not comport with the validation procedures in the EEOC regulations did not sway the court. Instead, it offered this response based on common sense:

> "There is no magic in any validating procedure, and the defendants need only supply competent and relevant evidence on this issue. As the Supreme Court said in *Washington v. Davis:*
>
> > 'It appears beyond doubt by now that there is no single method for appropriately validating employment tests for their relationship to job performance.' 426 U.S. at 247, n.13, 96 S.Ct. at 2051.
>
> The more obscure the justifications are, the more searching the inquiry must be. Conversely, the more obvious the relationship between the classification and the job requirements, the less searching the inquiry becomes." *Id.* at 65.

This Amicus would respectfully suggest that the district court exhibited a better grasp of what this Court has previously articulated on the concepts of job-relatedness and business necessity than did the Ninth Circuit. The latter court preferred a stringent approach, saying "Because the 'business necessity' defense is very narrow, it is not easy for employers to demonstrate the job-relatedness of selection devices shown to be prima facie violations of Title VII." (Slip op. at 15-16.) Nothing which this Court has said supports the view that an employer must adjust all selection standards to remove any statistical adverse impact on any protected group, save for the most narrow exceptions justified by elaborate and complex validation studies. Rather, in enacting Title VII, Congress merely required "the removal of *artificial, arbitrary,* and *unnecessary* barriers to employment when the barriers operate invidiously to discriminate on the basis of racial or other impermissible classification." *Griggs v. Duke Power Co.,* 401 U.S. 424, 431 (1971) (Emphasis added). Unlike this Court's approach in *Griggs,* the inexorable result of the approach decreed by the Ninth Circuit must be the abandonment of employment selection criteria, however firmly supported by common sense, if a statistical adverse impact is perceived. Such a result is contrary to this Court's express construction of congressional intent:

> "Congress has not recommended that the less qualified be preferred over the better qualified simply because of minority origins. Far from disparaging job qualifications as such, Congress has made such

qualifications the controlling factor, so that race, religion, nationality, and sex become irrelevant." *Griggs v. Duke Power Co., supra,* at 436.

In *Griggs,* the requirements in issue did not "bear a demonstrable relationship to successful performance of the jobs" and were adopted "without meaningful study of their relationship to job-performance ability." *Id.* at 431. The same consequences were apparent in *Albemarle Paper Co. v. Moody,* 422 U.S. 405 (1975) where the testing was implemented without analysis of the particular skills of the jobs involved or any significant correlations between test results and job performance.

However, in *Blake v. City of Los Angeles,* the Ninth Circuit imposed a higher standard of proof:

> "To justify the use of pre-employment selection devices as a business necessity, an employer must show that the tests or requirements are so closely job-related that their use is 'necessary to safe and efficient job performance.' (*Dothard, supra,* 433 U.S. at 332 n.14) Thus, the burden of demonstrating the job-relatedness of selection devices cannot be easily satisfied. (*See Officers for Justice, supra,* 395 F.Supp. at 384 (the large exclusionary impact of certain selection devices requires 'a very high degree of persuasion' for defendants to justify their use).) It is not a burden that can be carried by the assertion of an 'obvious,' but unmeasured, relationship between selection standards and qualities thought necessary for job performance. (*Dothard, supra,* 433 U.S. at 331.) Rather, it is essential that selection devices be 'validated' by professionally-acceptable methods. (*Albemarle, supra,* 422 U.S. at 431; *see Washington v. Davis, supra,* 426 U.S. at 247 & n.13.)" *Blake v. City of Los Angeles,* ____ F.2d____ (Slip op. at 17-18).

The court went on to mandate either a professional validation study or an even heavier burden of proof:

> "Validation studies must employ professionally-acceptable methods to increase the liklihood of obtaining trustworthy results. Courts have recognized that a number of validation techniques are professionally acceptable. (*See Washington v. Davis, supra,* 426 U.S. at 247 n.13 (describing three professional methods of validation).) The Equal Employment Opportunity Commission ('EEOC') has incorporated these techniques into guidelines that outline minimum standards for professional validation studies. (29 C.F.R. Sec. 1607) The Supreme Court has held that the EEOC guidelines are 'entitled to great deference' from courts determining whether employment selection devices comply with Title VII. (*Griggs, supra,* 401 U.S. at 434. *See Washington v. Davis, supra,* 426 U.S. at 247 n.13; *Albemarle, supra,* 422 U.S. at 430-34). Although compliance with the EEOC guidelines is not mandatory, an employer's burden of justification is much heavier if the guidelines have not been followed. (*United States v. City of Chicago, supra,* 573 F.2d at 427.)" *Id.* (Slip op. at 18-19).

The policy consideration behind such a demanding approach was made clear in footnote 6, where the Ninth Circuit said, in part, "The fact that it may be difficult to professionally validate selection devices does not excuse non-compliance with professional procedures; rather, it suggests that employers should be more cautious in employing selection devices that have discriminatory impacts." Thus, the employer can lawfully adopt only those selection standards, however obvious or appropriate, which either have no adverse impact or which are subject to a formal validation study.

Given the growing sophistication of the field of industrial psychology, it is a proper requirement that various testing procedures be studied on an experimental basis before allowing them to become "built-in headwinds" perpetuating prior inequities, without measuring job capability. *Griggs v. Duke Power Co., supra,* at 432. This Amicus firmly endorses the goal of equal opportunity for all and the abandonment of artificial barriers so well articulated in *Griggs.* But the limitations of validation procedures must not also limit the use of logic and reason in approaching that touchstone of business necessity. Yet this is the inevitable upshot of the Ninth Circuit's approach.

The ideal proof that a particular employment qualification is clearly "necessary to safe and efficient job performance," *Dothard v. Rawlinson,* 433 U.S. 321, 332, n. 14 (1977), is to employ persons with and without that particular qualification and compare their respective job performances. If the persons without that particular qualification are as effective as those with it, the conclusion is inescapable that the qualification does not "bear a demonstrable relationship to successful performance of the job for which it was used." *Griggs v. Duke Power, supra,* at 431. Conversely, if those lacking the particular qualification are consistent failures in their job performance, and if those with the particular qualification are successful, all other factors being the same, the job-relatedness is unquestionably established.[1] Such an

1. Unfortunately, the real world seldom provides such clearcut answers even where closely controlled experimentation is possible. Neither group is likely to perform uniformly well or poorly, but only more consistently in one direction than the other. Hence, the attempt of industrial psychologists to quantify the relationship between the particular qualification and the job performance in terms of correlation coefficients or other statistical expressions.

experimental approach is easily applied to some jobs and some projected qualifications. For others, only careful job analysis is possible, with the qualifications being linked through logic, rather than actual experimentation, to establish a rational relationship.

A modest example shows how methodology merges with madness if carried to the extreme. Suppose that, because of inferior educational opportunities or cultural barriers, a minority group has a very high percentage of non-swimmers compared to the majority. Thus, the ability to swim as a requirement for the job of lifeguard would have an adverse impact against this minority group, requiring proof of business necessity, And, said the Ninth Circuit, it "is not a burden that can be carried by the assertion of an 'obvious', but unmeasured, relationship between selection standards and qualities thought necessary for job performance." (*Blake,* Slip op. at 18.) To be sure, a comprehensive job analysis could show that swimming is occasionally done by lifeguards to effect a rescue. But how frequently must it occur? The Ninth Circuit implied the control of resisting suspects occupied only a minor part of police duties (see footnote 8), since an officer wrestled with a suspect only once every 20 watches and was kicked or hit once every 33 watches. How frequently must a skill be used before it will support a job requirement? That court also suggested the exclusion from the validation study of persons who did not meet the minimum height requirement was a telling criticism. Must non-swimmers be employed as lifeguards to establish by statistics (of the number of victims) that they could not perform equally as well? And, would a few successful rescues by non-swimmers in shallow water be sufficient to reduce the correlation

to make it of little value? Would unsuccessful rescue attempts by the swimmers be deducted from the number of successful rescues, thereby further reducing the correlation with job performance? Given the Ninth Circuit's standard of review for validation studies, one might be left without adequate proof that the ability to swim is so manifestly related to the job of lifeguard as to be justified by business necessity.

If the foregoing example is a form of *reductio ad absurdum,* it has its real-life counterpart in *Smith v. Olin Chemical Corp.,* 555 F.2d 1283 (5th Cir. 1977). There a laborer was discharged because he had a bad back, even though the employer had not conducted a validation study to support this requisite. The original panel that considered the case quoted plaintiff's theory:

> "Because sickle cell anemia affects Blacks almost exclusively, probability dictates that bone degeneration, a common condition resulting therefrom, would be present among proportionately more Black workers in a labor force than among workers of any other race. If the presence of bone degeneration is used to automatically disqualify a worker from a position which involves manual labor, proportionately more Black workers would be disqualified than workers of any other race. This is unquestionably a discriminatory effect within the meaning of *Griggs v. Duke Power* . . . Therefore the defendant has the very heavy burden of showing that business necessity requires continuation of the discriminatory practice." *Smith v. Olin Chemical Corp.,* 535 F.2d 862, 864 (5th Cir. 1976)

This language is analogous to that of the Ninth Circuit in *Blake,* quoted *supra.* However, after an *en banc* rehearing, the Fifth Circuit firmly rejected plaintiff's theory:

> "The question then is whether, assuming that the pre-conditioning of employment for manual labor on the absence of bad back or degenerative spinal conditions operates to discriminate against black Americans in substantially disproportionate percentages, an employer should be forced to satisfy an evidentiary burden of proving business necessity under *Griggs.* We think not." *Smith v. Olin Chemical Corp., supra,* 555 F.2d at 1286.

Unlike the Ninth Circuit's conclusion that Title VII mandated universal validation studies, the reasoning of the Fifth Circuit was very similar to that of the district court in *Blake*:

> "Few cases have dealt with the proposition that there are certain employment practices that will not trigger the requirement of proof from the employer. Indeed, some may assert that every practice which has a discriminatory effect requires some evidentiary proof from the employer to justify its use. We are not so ready, however, to permit bare 'effects' allegations to carry the burden to the employer where the employment requirement is patently neither artificial nor arbitrary, and obviously related to business necessity." 555 F.2d at 1286. (Compare *Blake v. City of Los Angeles,* 435 F.Supp. at 65.)

The Fifth Circuit then analyzed this Court's opinion in *McDonnell Douglas Corp. v. Green,* 411 U.S. 792 (1973) and found it "clearly indicates that there is a narrow class of job requirements for which no evidentiary showing is needed." *Smith v. Olin Chemical Corp.,* 555 F.2d at 1286. In *Green* the employer had offered no proof that the articulated "legitimate, nondiscriminatory reason for the employee's rejection" had "any effect on the plaintiff's ability to perform the work." Thus, "as a matter

of law, the Supreme Court held that the practice did not require evidentiary justification, and said that the only issue on remand would be whether the policy was used as a pretext." *Smith v. Olin Chemical Corp., supra* at 1286-1287. That court went on to suggest that

> "the direct comparison with *Griggs* in the text and the company-wide nature of the policy indicate the holding has significance beyond its particular facts. It suggests that a facially neutral job criterion can be so manifestly job-related so as not to be 'the kind of "artificial, arbitrary, and unnecessary barriers" ' Title VII prohibits. In such a case, the employer need not make an evidentiary showing of business necessity, even though the criterion may have a discriminatory impact.
>
> "The need for a manual laborer to have a good back is such a criterion." 555 F.2d at 1287.

A similar approach based on common sense and flexibility in evaluating employment requirements is found in *Spurlock v. United Airlines, Inc.*, 475 F.2d 216 (10th Cir. 1972) where that Court declared:

> "When a job requires a small amount of skill and training and the consequences of hiring an unqualified applicant are insignificant, the courts should examine closely any pre-employment standard or criteria which discriminate against minorities. In such a case, the employer should have a heavy burden to demonstrate to the court's satisfaction that his employment criteria are job related. On the other hand, when the job clearly requires a high degree of skill and the economic and human risks involved in hiring an unqualified applicant are great, the employer bears a correspondingly lighter burden to show that his employment criteria are job-related." *Id.*, 475 F.2d at 219.[2]

That the Fifth Circuit's analysis of *McDonald Douglas v. Green, supra,* in *Smith v. Olin Chemical Corp., supra,* was correct is suggested by this Court's decision in *Furnco Construction Co. v. Waters,* ____U.S.____, 98 S.Ct. 2943 (1978). There the employer's reliance in hiring only experienced and highly qualified fire bricklayers was justified as a business necessity required for the safe and efficient operation of its business and not as a pretext for racial exclusion. There is no suggestion that the employer either had to validate its requirement by the EEOC guidelines on testing or face a heavier burden of justifying it. Indeed, this Court's opinion strikes a contrast to the Ninth Circuit's admonition "that employers should be more cautious in employing selection devices that have discriminatory impacts" (*Blake v. City of Los Angeles,* footnote 6). In *Furnco Construction Corp. v. Waters, supra,* 98 S.Ct. at 2949, this Court observed:

---

2. See also *Boyd v. Ozark Air Lines,* 568 F.2d 50, 54 (8th Cir. 1977), which specifically rejected the Plaintiff's argument that a minimum height requirement must be validated in accord with the EEOC guidelines. Similarly, in *Yuhas v. Libbey-Owens-Ford Co.,* 562 F.2d 496 (7th Cir. 1977), statistical proof was lacking, and that Court upheld the challenged policy and made this balanced assessment:

> "It would be hard to prove that any of these reasons for maintaining a no-spouse rule are valid in the sense that, without the rule, production would fall. Our devices for measuring industrial efficiency and morale are not so finely tuned that they can easily make such a determination. On the other hand, these reasons are far from frivolous. They correspond to the reasons which have led a number of institutions to conclude that family members should not work in the same environment. The movement to a sharp dichotomy between the workplace and the home may not in the long run prove to be a fruitful one, but it has become widely prevalent in our society." 562 F.2d at 499.

> "The Court of Appeals, as we read its opinion, thought Furnco's hiring procedures not only must be reasonably related to the achievement of some legitimate purpose, but also must be the method which allows the employer to consider the qualifications of the largest number of minority applicants. We think the imposition of that second requirement simply finds no support either in the nature of the prima facie case or the purpose of Title VII."

It would seem that this is the basic thrust of the Ninth Circuit's *Blake* opinion, i.e. to remove all employment requirements which might affect minority groups on a statistical basis by imposing unrealistic demands on the employer to justify them. The *Blake* court would further limit an employer's flexibility in examining available alternatives even if a business necessity can be shown (Slip op. at 24-25). The Los Angeles Police Department, the Ninth Circuit suggested, must modify departmental policies if necessary to employ an equal percentage of male and female applicants. This approach seems to go further than that already rejected in *Furnco Construction Co. v. Waters, supra,* 98 S.Ct. at 2949, where the employer was merely to "consider" the largest number of minority applicants.

Surely the departmental policies of the Los Angeles Police Department are entitled to equal, if not greater, deference than the legitimate purpose recognized in *Furnco.* This Court has frequently noted the unique and sensitive nature of the police function in our society. See *National League of Cities v. Usery,* 426 U.S. 833, 845-852 (1976); *Kelley v. Johnson,* 425 U.S. 238 (1976); *Foley v. Connelie,* ____U.S.____, 98 S.Ct. 1067 (1978). In the latter case, this Court observed:

> "A discussion of the police function is essentially a description of one of the basic functions of government, especially in a complex modern society where police presence is pervasive. The police function fulfills a most fundamental obligation of government to its constituency. Police officers in the ranks do not formulate policy, *per se,* but they are clothed with authority to exercise an almost infinite variety of discretionary powers. The execution of the broad powers vested in them affects members of the public significantly and often in the most sensitive areas of daily life." *Foley v. Connelie, supra,* 98 S.Ct. at 1071.

The distinctive nature of the police officer's job also made it fundamentally different from other types of employment:

> "Clearly the exercise of police authority calls for a very high degree of judgment and discretion, the abuse or misuse of which can have serious impact on individuals. The office of a policeman is in no sense one of 'the common occupations of the community' that the then Mr. Justice Hughes referred to in *Truax v. Raich,* 239 U.S. 33, 41, 36 S.Ct. 7, 10, 60 L.Ed. 131 (1915). A policeman vested with the plenary discretionary powers we have described is not to be equated with a private person engaged in routine public employment or other 'common occupations of the community' who exercises no broad power over people generally. Indeed, the rationale for the qualified immunity historically granted to the police rests on the difficult and delicate judgments these officers must often make. See *Pierson v. Ray,* 386 U.S. 547, 555-557, 87 S.Ct. 1213, 1218-1219, 18 L.Ed.2d 288; cf. *Scheuer v. Rhodes,* 416 U.S. 232, 245-246, 94 S.Ct. 1683, 1691, 40 L.Ed.2d 90 (1974)." *Id.* 98 S.Ct. at 1072.

Nothing in the Ninth Circuit's *Blake* opinion suggests that Court saw any distinction between the function of a police officer and that of any other job. As a result, whatever the job, there must be selection standards designed to maximize the employment of minorities and women, even though reasonable policies and procedures must be modified or abandoned to achieve that end.[3] Neither the terms of Title VII nor this Court's construction of it supports the reasoning or the result of the Ninth Circuit's *Blake* opinion. This Court should clarify the meaning of "job-relatedness" and "business necessity" as legal standards under Title VII.

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3. The view that the business necessity defense "is very narrow," (Slip op. at 15) makes it analogous to the "strict scrutiny" standard of review in Equal Protection cases. That approach was expressly rejected in *United States v. State of South Carolina,* 445 F.Supp. 1094 (D. S.C. 1977), where a three-judge court said:

> "We think that *Griggs* did not import into Title VII law the concept of 'compelling interest' developed as a part of the 'strict scrutiny' standard for assessing certain classifications under the Fourteenth Amendment. Under this concept, the Court would balance the disparate impact on blacks against the business purpose of the employer and uphold the business practice only if it were sufficiently 'compelling' to overcome the disparate impact. It is our view that the Supreme Court intended an examination of the alternatives available with respect to the legitimate employment objective identified by the employer to determine whether there is available to the employer an alternative practice that would achieve his business purpose equally well but with a lesser disparate impact by race. In examining alternatives, the risk and cost to the employer are relevant." 445 F.Supp. at 1115.

This Court affirmed that judgment, ____U.S.____, 98 S.Ct. 756 (1978).

CONCLUSION

For the foregoing reasons, this Amicus urges that the petition for Writ of Certiorari be granted.

Respectfully submitted,

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BRIEF OF THE COUNTY OF LOS ANGELES AS AMICUS CURIAE IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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INTEREST OF THE AMICUS CURIAE

This brief amicus curiae is hereby submitted pursuant to Rule 42(4) of the Rules of the Supreme Court of the United States in support of the petition for certiorari. Amicus, the County of Los Angeles, public entity, is a political subdivision of the State of California and maintains a law enforcement agency, the Sheriff of the County of Los Angeles, as a department thereof.

As a public employer, amicus is subject to the provisions of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §§2000e, et seq. (hereinafter, "Title VII"). Because of the nature of the decision of which Petitioners seek this Court's immediate review, amicus is concerned that its employment practices will require substantial and costly revision to comply with the requirements of Title VII as set forth therein.

SUMMARY OF ARGUMENT

Amicus is concerned that the decision of the United States Court of Appeals for the Ninth Circuit in the case of Fanchon Blake, et al. v. City of Los Angeles, et al., Nos. 77-3595 and 77-3601, filed May 2, 1979, will have the effect of prohibiting the use of height limitations and physical abilities tests in the Ninth Circuit as a matter of law, regardless of the evidentiary showing that Petitioners may make at trial. Such a consequence is inevitable because the Ninth Circuit went beyond the proper grounds for denying a motion for summary judgment and based its decision on standards which are in conflict with established law.

To the extent that the decision of the Ninth Circuit requires that the "business necessity" of a challenged employment practice must always be shown in order to rebut a prima facie case of discrimination and to the extent that the legal standards enunciated in the decision for establishing

the "business necessity" of a challenged employment practice generally apply to cases brought under Title VII, it must be initially determined whether or not the pronouncements of the Ninth Circuit are a correct interpretation of the law. Such a threshold determination is essential before it can be ultimately determined at trial whether or not sufficient evidence has been adduced to support Petitioners' particular use of a height limit and physical abilities test.

This threshold determination of proper legal standards is particularly crucial because such standards would substantially affect the selection practices of amicus and other public entities with law enforcement agencies, regardless of whether or not Petitioners could adduce sufficient evidence at trial to carry their burden in justifying their particular use of a height limit and physical abilities test as selection devices.

ARGUMENT

I

THE DECISION OF THE NINTH CIRCUIT IS IN DIRECT CONFLICT WITH ESTABLISHED LAW IN THE STATE OF CALIFORNIA AND REQUIRES IMMEDIATE RESOLUTION

Of particular concern is the effect of the Ninth Circuit's decision upon physical abilities

testing in California, especially since the job-relatedness of such testing has only recently been upheld by the State Supreme Court in Hardy v. Stumph, 21 Cal. 3d 1 (1978) under a different legal standard, which amicus submits is the proper one.

In Hardy, a case alleging sex discrimination under Title VII as well as Constitutional equal protection provisions, the California Supreme Court found that the challenged physical agility test, which had a severe disproportionate impact on women and which included, inter alia, a six foot wall climb which plaintiff had failed, was both "reasonably related" to job performance under the traditional equal protection standard of review and met the "validity" requirements of the Equal Employment Opportunity Commission guidelines. The Hardy case implied, at least, that the physical agility test in question was sufficiently job related without separate "validation" of its "business necessity." 1/ In that regard, the closing comment of the California Supreme Court in Hardy is worth quoting:

> ". . . Surely, it is difficult to imagine a more accurate way of

---

1/ That the ability to climb a six foot wall was an inherent part of a police officer's job was determined by both a job analysis and evidence that a local ordinance allowed walls to the height of six feet.

> testing ability to scale a six-foot wall than to scale one."
> Id, 21 Cal. 3d at 11.

II

THE LEGAL STANDARDS THAT THE NINTH CIRCUIT WOULD IMPOSE ARE UNPRECEDENTED, CONTRARY TO EXISTING AUTHORITY, AND WOULD COMPROMISE THE PROVISION OF EFFECTIVE LAW ENFORCEMENT SERVICES TO THE PUBLIC

To the extent that the Ninth Circuit requires "validation" to establish job-relatedness, even in the narrow sense in which it finds job-relatedness relevant to the "business necessity" standard, and implies that no satisfactory "validation" can be accomplished without including candidates whom the employment practice otherwise disqualifies, amicus and similar public entites would be forced to expend more funds for less effective service to the public in order to avoid expensive litigation and potential liability. Such a consequence would be inevitable under the standard imposed by the Ninth Circuit regardless of how legitimate the employment practice is later proven to be.

Such waste is totally unjustified even if, arguendo, alternate methods of selection could increase the number of women in law enforcement without seriously impairing safety or efficiency,

a showing which has not been made by Respondents, because there is absolutely no legal requirement for Petitioners to do so. Furnco Constr. Corp. v. Waters, 98 S.Ct. 2943 (1978).

In Furnco this Court made clear that so long as the challenged employment practice is "reasonably related to the achievement of some legitimate goal" (emphasis added) (Id. at 2950), the employer has carried his burden of rebutting the prima facie case of discrimination under Title VII. It is then the plaintiff's burden to show that such employment practice was a pretext for discrimination. There is no further burden on the employer to "validate" his employment practice as a "business necessity" or to modify it to accommodate more members of a protected group under Title VII. This lack of a legal requirement to modify business practices merely to increase the representation of a protected group would apply with even greater force where, as here, significant improvement in the functioning of the business was not shown by the addition of members of the protected group.

It should further be pointed out that this Court in Furnco noted in affirming the findings of the district court that there was no doubt that the "business necessity" of Furnco's employment practices was established (Id. at 2947). Earlier in the opinion, this Court had reviewed with approval the facts upon which the district court's finding of the "business necessity" of the challenged employment practices was based. There was no indication that such facts included a "validation study" of any sort and, certainly, no showing that the employer had suspended the challenged employment practice to ascertain whether the delays caused by incompetents would,

in fact, severely and negatively affect his ability to remain in business. (Id. at 2946-7.)

In terms of the height requirement in particular, this Court left as an open question in Dothard v. Rawlinson, 433 U.S. 321 (1977), the nature of evidence which it would find acceptable as justification of such a requirement. However, three Justices of this Court, in a concurring opinion, indicated that an argument in support of height and weight minima, based on the appearance of strength, rather than actual strength, although not perfectly correlated, would be persuasive justification under Title VII. Such an argument would receive short shrift with the Ninth Circuit if its interpretation of the law is not reviewed and inconsistencies with the opinion of this Court resolved.

III

IMMEDIATE REVIEW OF THE LEGAL STANDARDS IN QUESTION WOULD BENEFIT ALL PARTIES AND PREJUDICE NONE

In conclusion, amicus would strongly urge the Court to grant certiorari in this matter on the ground that no prejudice could occur to Respondents as a result of a determination of the proper legal standards to be applied on remand prior to such remand; whereas, the application of incorrect legal standards by the Ninth Circuit would necessitate further appeal and subsequent remand. Furthermore, assuming Petitioners prevail despite the standards imposed by the Ninth Circuit, it would be impossible for Petitioners to challenge

the propriety of the legal standards under which they prevailed unless some other ground for appeal were found. Thus, the Court would have to await the next case before it could correct the Ninth Circuit's misinterpretation of established law. The harm that would be suffered by amicus and others similarly situated and by the public has already been discussed. Thus, it is apparent that the issues raised by Petitioners should be addressed by this Court at this time as the only efficient and judicially economical alternative.

CONCLUSION

For these reasons, amicus believes that a writ of certiorari should issue so that the judgment and decision of the Ninth Circuit can be thoroughly reviewed.

Respectfully submitted,

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United States, *Respondent*

AMICUS CURIAE PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF AMICUS CURIAE OF THE INTERNATIONAL ASSOCIATION OF CHIEFS OF POLICE

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In The

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JURISDICTION

This brief is filed pursuant to Rule 42 of the Supreme Court Rules. Consent to file an amicus curiae petition for writ of certiorari has been granted by Mr. Neal C. Baker, Counsel for the Petitioner; Mr. Wade H. McCree, Jr., Solicitor General of the United States; and Mr. A. Thomas Hunt, Counsel for the Respondent Blake. Letters of consent have been filed with the Clerk of this Court.

STATEMENT OF INTEREST

The California Peace Officers Association is a nonprofit professional association with membership of over 10,000 local, county and state peace officers throughout the state of California. The association, which has been in existence for 55 years, has worked to upgrade peace officers through publications as well as training endeavors. The association has also been actively involved in the legislative arena. Based on studies of physical fitness standards done under LEAA grants by the Commission on Peace Officer Standards and Training, the association strongly feels that the termination of federal funds received by the Los Angeles Police Department is premature.

The International Association of Chiefs of Police, Inc. (IACP) represents over 8,800 chiefs and top executives of American police departments and other law enforcement agencies in all 50 states and 61 foreign countries. The IACP serves the law enforcement profession and the public interest by advancing the art of police service. Its aims are to foster police cooperation and the exchange of information and experience among police administrators throughout the world, and to encourage adherence by all police officers to high professional standards of performance and conduct. With regard to law-related activities in police professionalism, the IACP in 1970 formed the Police Legal Center of the IACP. This center serves as a hub for legal advisors and police legal units nationwide, and publishes numerous periodicals, documents, and in-service legal training materials for use both by police officers and executives.

The interest of both amici in the instant case stems from the importance of the issues involved, the resolution of which will

have a direct and material impact upon the effectiveness of law enforcement.

In holding that the city has not met the burden of proving the lawfulness of its height requirement and physical agility test, the Circuit Court in *Blake* adopted a standard of proof for employers which will be impossible to meet. National interest exists in resolving the constitutionality of a rule of law which provides for shifting the burden of proof against a governmental entity on the basis of statistics which are not probative of intentional discrimination. This case provides an opportunity for this Court to clarify the standard for a prima facie case against a governmental entity.

In its *Blake* decision, the Ninth Circuit ruled that police agencies must utilize alternative policies of law enforcement to lessen the adverse impact that selection standards may have on a particular group. This mandate ignores the fundamental concept of local control of police policies and will have a detrimental impact on the concept of local law enforcement. A number of factors affect the stringency of the selection process adopted by a police agency, including special competence, interests and needs, as well as the style of law enforcement to be implemented and the character of the community the police agency serves.

Police departments which do not adopt the alternative policies will be theatened with back pay liability and the termination of federal funding. Agencies which do modify their policies may be placed in the position of adopting a style of law enforcement which is not best suited for the communities they serve. The writ of certiorari should be granted to ensure that local police departments may continue to establish law enforcement policies on the basis of local needs and priorities.

With regard to the issue of hiring individuals not meeting selection standards to demonstrate the business necessity of selection requirements, such a procedure overlooks the concept of merit selection in civil service employment and the cost of training police officers. Further, this procedure provokes concern with regard to the civil liability of police agencies and municipalities. The ever-increasing possibility of being sued for actions taken by officers during the performance of duty is a vital

concern among law enforcement administrators. Individuals hired to demonstrate the business necessity of a selection standard may become the source of suits against the police agency or the municipality on such theories as negligent appointment, negligent assignment, or negligent retention.

With regard to the issue that the dual classification of police officers prior to 1973 violated constitutional equal protection, amici wish to support the position taken by the Petitioner, the City of Los Angeles, namely that liability should not result from an action which at the time taken was progressive and socially responsible.

Amici urge the court to provide guidance for local police agencies as to how compliance with federally mandated quotas can be accommodated within the rules of a civil service merit system. Finally, standards for the granting of a preliminary injunction enjoining the termination of federal funds should be established by the Court.

REASONS FOR GRANTING THE WRIT

I

In the *Blake* decision, the Ninth Circuit Ignored the Fundamental Concept of Local Control of Police Policies.

In its *Blake* decision, the Court of Appeals held that the Police Department is obligated to utilize alternative policies of law enforcement if those alternatives would permit the Department to hire police officers by using selection standards which have less adverse impact on a particular group. In other words, a police department may no longer meet its burden of demonstrating that its selection devices are lawful under Title VII of the 1964 Civil Rights Act, as amended, by showing that those standards are related to the tasks which a police department requires its officers to perform. Rather, that police department must also demonstrate that it could not restructure the tasks performed by those police officers to minimize the need for aselection standard having an adverse impact on a racial, ethnic, or sex group. That rule of law, unless reviewed by his Court, will

have a dramatic and detrimental impact upon the concept of local law enforcement as it traditionally has been implemented in this country.

It is common knowledge among students of police science that different communities have different "styles" of law enforcement. In a now classic study of eight police departments, Professor J. Wilson theorized that police departments may be divided into three separate models: the "watchman style," the "legalistic style," and the "service style." J. Wilson, *Varieties of Police Behavior* (1968). The author selected those eight communities, "[b]ecause the amount of police activity and the way that police discretion is used will depend in part on the character of the community . . . ." *Id.* at 89.

Later, after reviewing his data, Professor Wilson found that, even between cities of the same relative populations, there were tremendous differences in traffic enforcement, policies regarding gambling and vice, juvenile arrest rates, and public drunkeness. *Id.* at pp. 95-96, 99, 114, and 122-125. As a result of his study, Professor Wilson theorized that law enforcement agencies respond to different needs, depending upon the communities that they serve. *Id.* at 287.

The style of the law enforcement agency will influence the tasks performed by its police officers. For example, when a department faces a serious crime problem in its jurisdiction, it may utilize plainclothes officers to apprehend as many suspects as possible, while another department may attempt to suppress crime by saturating the area with identifiable police officers. Still other agencies will emphasize the involvement of community service organizations to deal with the social problems which are perceived to be leading to the crime wave. See J. Kuykendall and P. Usinger, *Community Police Administration* (1975) at pp. 27-28. In the past, the exercise of a style of police protection has been deemed by this Court to be a function which state and local governments "are created to provide . . . ." *National League of Cities v. Usery*, 426 U.S. 833, 851 (1976).

Indeed, in some jurisdictions, police departments have chosen to drop physical selection standards completely, and willingly accept the change of police policies which results from a lack of selection standards. For example, in the early 1970s, the

Washington Metropolitan Police Department and the Police Foundation studied the performance of 86 women hired as metropolitan police officers and an equal number of men. While those individuals were matched with respect to many personnel criteria, they had been hired without the use of a physical ability test. Further, the women averaged one and a half inches shorter and 32 pounds lighter than the men. Block & Anderson, *Policewomen on Patrol, Final Report* (Police Foundation, 1974) at p. 1.

Later, comparing the performance of the male group with the performance of the smaller, lighter, female group, the study established the following:

> (1) Men assigned to patrol averaged 53 citations for a six-month period, compared to 22.6 citations for similarly situated women. Men in all assignments averaged 49.8 citations, and similar females averaged 20.6. *Id.* at p. 24.
>
> (2) Males assigned to patrol averaged 4.8 felony arrests and 11.4 misdemeanor arrests in a six-month period, while women assigned to patrol averaged 1.8 felony arrests and 5.2 misdemeanor arrests. For individuals on all assignments, the males averaged 4.7 felony arrests and 10.8 misdemeanor arrests in a six-month period, while the women averaged 1.4 felony arrests and 3.9 misdemeanor arrests. *Id.* at p. 23.

Thus, the taller, male group issued twice as many traffic citations, made approximately three times the number of felony arrests, and made twice the misdemeanor arrests than the smaller, female group.

In other police departments, police managers have decided to utilize different acceptable levels of force in controlling resisting suspects. Typicaly, different communities have a varied tolerance for the use of force by police. The amici believe that an effective police department is one which accepts and adopts the approach which is best suited for its community.

The obvious risk of the decision by the Ninth Circuit is that every police department in the country will be forced (1) to

modify its policies to accept higher levels of force by police officers, and/or (2) to assign police officers with the understanding that many of the lighter and smaller individuals will not initiate as many arrests and traffic citations as the more physically qualified individuals. The alternative to the development of such policies is the threat of catastrophic back pay liability and the termination of federal funding; threats which now are being made against the City of Los Angeles as a result of the Ninth Circuit's decision. Such a choice is unacceptale to the amici, and they urge this Court to grant the writ of certiorari to consider that issue.

II

Notwithstanding the Problem of "Alternatives", the Ninth Circuit's Decision has Made it Impossible for a Police Agency to Demonstrate the Lawfulness of its Selection Standards.

Apart from the "Alternatives" theory, the Ninth Circuit's decision is also detrimental to law enforcement because it makes impossible a demonstration of the lawfulness of any physical selection standard. That decision, which requires an agency to hire individuals not meeting its height and physical ability standards so that those individuals could be studied, violates common sense and overlooks a concept of merit selection in civil service employment.

First, as the District Court stated, the Los Angeles Police Department's evidence pointed out "what is obvious and needs little proof." *Blake v. City of Los Angeles, supra,* 435 F. Supp. at 65. That evidence suggested "that a stronger and taller officer can more quickly and effectively control another person in the event of a confrontation. This officer is likely to be able to do so without having to resort to an extreme force, such as the use of a gun or dangerous control hold. In self-defense situations, the taller and stronger officer is more likely to be successful. The taller the officer, the better his opportunity to observe, evaluate, and properly judge situations in the field." *Id.* Given that evidence, any chief of police would be derelict in his duty to protect the public if he were to hire individuals who do not meet those qualifications merely for an academic study.

Assuming, arguendo, that such a study would serve a useful purpose to demonstrate the "business necessity" of common sense selection requirements, the view of the Court of Appeals that individuals not meeting those selection requirements could be hired and trained for the purpose of that validation study overlooks the principles of civil service merit selection, and the cost of training police officers. First, civil service merit selection is not a pretext for racism. As the U.S. Court of Appeals for the Second Circuit has stated:

> Civil Service laws, like civil rights laws, were enacted to ameliorate a social evil. In the former case, it was the spoils system; in the latter, discrimination. *** It seems to us that the judiciary should act with great reluctance in undermining traditional civil service concepts; and if a decision is to be made to subordinate the social purposes of civil service to those of equal employment opportunity, that decision should be made by the people, speaking through their legislators. *Kirkland v. N.Y. State Department of Correctional Services,* 520 F. 2d 420, 428, 429 (2nd. Cir. 1975), *certiorari denied,* 429 U.S. 823 (1976).

Because of those civil service laws, a state or municipality cannot hire a qualified individual merely for the purpose of study, only to dispose of him or her after the study is over. Those individuals, by virtue of civil service protections, typically acquire a vested right to their positions.

Moreover, the Ninth Circuit's desire to hire individuals for the purpose of validation studies will be extremely wasteful in terms of tax dollars. Increasingly, public jurisdictions have become aware that police officers need to be well trained before they are sent out into the field. It is not uncommon to find police training programs, for which officers are fully salaried, lasting from five months to one year. Thus, the cost of training individuals to comply with the Ninth Circuit's desire for a perfect validation study to prove the lawfulness of the selection requirement will be prohibitive.

III

The Court of Appeals has Committed a Gross Error in Granting Judgement of the Plaintiffs on Grounds of Equal Protection as to the Use of Separate Classification of Policemen and Policewomen Prior to 1973.

The Supreme Court should also grant a writ of certiorari to the Ninth Circuit as a result of the lower court's ruling that the use of "Policeman" and "Policewoman" classifications prior to 1973 violated constitutional equal protection. In the early 1970s, the use of women in patrol positions was a novelty, limited to a handful of jurisdictions. In fact, many jurisdictions had no women in any sworn police function. The larger and more progressive police departments, including that of the City of Los Angeles, had policewomen performing limited duties such as the protection of children and the investigation of sex crimes. It would be a bitter irony if that use of sworn women personnel at a time when many police departments hired no women in sworn positions were to now result in a liability to that city.

IV

This Court Should Grant a Writ of Certiorari in *U.S. v. City of Los Angeles* on the Ground that Automatic LEAA Fund Termination Provision Should Not Apply Where the Objective of the Government has Been to Require Hiring Quotas.

The amici are very concerned about the pattern of coercion emanating from certain of the federal compliance agencies. When, as in this case, the coercion is intimately tied to funding of a police department, the policy makers in the local community are placed in an impossible position. First, those leaders have the responsibility to administer the personnel needs of the law enforcement agency by utilizing a civil service merit system. However, to continue receiving federal funding for law enforcement programs, they are forced to meet federally mandated quotas, even if those quotas mean abandoning selection standards which they believe to be lawful and job related.

The amici believe that provisions of the Omnibus Crime Control and Safe Streets Act 1968 (42 U.S.C. Section 3766 (c) (2) (E)) specifically forbid that untenable situation. We urge this Court to consider that issue so that local officials may be guided in their future actions with those compliance agencies.

CONCLUSION

For the foregoing reasons, the amici submit that a writ of certiorari should issue to review the judgement and opinion of the Ninth Circuit.

Respectfully submitted,

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AMICUS CURIAE BRIEF OF CITY OF EAST CLEVELAND IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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INTEREST OF AMICUS CURIAE

The City of East Cleveland 5′ 8″ height required by ordinance for entry level police officers was held non-violative of the 14th Amendment to the U. S. Constitution, notwithstanding violative allegations and arguments at every level respecting the "due process" and "equal protection" clauses in *Smith v. Troyan*, (6th Cir., 1975) 520 F.2d 492, *pet. for reh. en banc denied* August 21, 1975, *cert. denied* June 14, 1976, 49 L. Ed. 2d 380, *pet. for reh. on*

cert. denied November 1, 1976. The within appellate court decision holds that an act of Congress invalidates a similar requirement of the City of Los Angeles and is "appropriate legislation to enforce" the 14th Amendment.

OPINIONS BELOW

See Petition for Writ of Certiorari.

JURISDICTION

See Petition for Writ of Certiorari.

QUESTION PRESENTED

Is it "appropriate" and constitutionally authorized legislation by Congress "to enforce" the 14th Amendment to enact a law in 1972, effective immediately, that creates a general presumption of unconstitutionality respecting existing and long standing municipal standards and tests considered critical and necessary for the selection of police officers and upheld as constitutional and nonviolative of the 14th Amendment after review or denial of Certiorari by the U. S. Supreme Court in 1976, and placing the burden of overcoming such presumption of unconstitutionality upon the municipalities in terms whereby the municipalities are not permitted to utilize conventional evidence available to them, but are required to produce unavailable statistical data empirically proving that those who do not meet the critical selection standards could not perform the critical functions of a police officer in a safe and efficient manner in light of National League of Cities v. Usery, 426 U.S. 833 (1976)?

THE CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

See Constitution of The United States, Amendment XIV; 42 U.S.C. 1983, Title VII Civil Rights Act of 1964 as amended in 1972 (42 U.S.C. 2000e et seq.), and Petition for Writ of Certiorari.

STATEMENT OF FACTS

See Petition for Writ of Certiorari.

REASONS FOR GRANTING THE WRIT

A fair reading of the 9th Circuit Court decision indicates that the important stated constitutional question was properly raised in the lower court. The case relates to essential State and Municipal decisions regarding the conduct of integral governmental functions, to wit: selection and provision of police officers having the authority and responsibility to keep peace and physically arrest violators without first securing a warrant.

The Court of Appeals reversed the Trial Court, *Blake v. City of Los Angeles,* (U.S.D.C., C.D. Calif., 1972) 435 F. Supp. 55, finding that: (1) the evidence submitted under the vehicle of a summary judgment motion was insufficient to justify use of a gender classification, "policemen" and "policewomen," prior to the passage of Title VII (42 U.S.C. 2000e et seq.) amendments on March 24, 1972, and while the City was developing less restrictive physical standards and tests for selecting police officers; (2) finding the evidence insufficient to sustain the City's 5'6" height requirement and physical test battery adopted July 1, 1973; and (3) determining that the only evidence that can satisfy

Title VII are statistical correlations that can only be secured by making an experiment of public safety, utilizing an Industrial Psychologist, hiring people who are certain to fail in the judgment of professional experts for the City, and exposing the public to the risk and liability until the Industrial Psychologist has enough data, regardless of the time, the risk and liability exposure, the cost, and the availability of other evidence and professional opinions.

There are and have been many cases in the District Courts dealing with minimum height requirements for police officers. These cases have diverted at least $50,000 of municipal funds away from direct service utilization in each case and have otherwise drained away time and effort that was desperately needed to combat crime in the nation's communities. The City of East Cleveland (39,600 population in 3.2 square miles) had its height requirement held constitutional in *Smith v. Troyan,* (6th Cir., 1975) 520 F.2d 492, *pet. for reh. en banc denied* August 21, 1975, *cert. denied* June 14, 1976, 49 L. Ed. 2d 380, *pet. for reh. on cert. denied* November 1, 1976. Now the City is back in Court with *Malone, et al. v. East Cleveland,* (U.S.D.C., N.D. Ohio) Case No. C75-894 wherein the same claims are being asserted under Title VII that were asserted under 42 U.S.C. 1983. One other city, Shaker Heights, Ohio, which relied in part on the decision in the *Smith* case, *supra,* is now in court in *Hammond v. Shaker Heights, et al.,* (U.S.D.C., N.D. Ohio) Case No. C78-1303 under a similar attack on its 5'8" minimum requirement for police officers.

The impact on the nation's cities and the Supreme Court docket will be tremendous unless a case such as the within case is taken to clarify the constitutional and evidentiary issues at stake. Does every city in the nation have to go through multiple attacks and litigation on physical standards and tests deemed essential to provision of

police officers of sufficient strength and ability to arrest the average criminal?

The Appellate Court decision creates tremendous uncertainty for municipalities in two critical respects, to wit: (1) selection for the position of police officer, probably requiring the most certainty in decision, is impossibly clouded with uncertainty, and (2) attempts to comply with the 14th Amendment and not violate same by following the wisdom of Supreme Court decisions are seriously undermined and clouded with uncertainty, if Congress is given *carte blanche* authority to determine what is or isn't violative of the 14th Amendment notwithstanding such decisions. The decisions pertaining to local government and sovereignty have to be made on what is or is not constitutional and the interest and expertise of local officials as to what is constitutional and required by the circumstances and history should be given some weight in our system of Federalism.

Historically, the nation's cities or municipalities have *ab initio* maintained police officers including police officers having the authority *inter alia* when a crime has been committed, to arrest and detain using whatever force is reasonably necessary, to secure evidence, and to bring the accused before a court to answer to the charges. Unlike many Federal agents, e.g., F.B.I., police officers have the authority and are required more often than not to react spontaneously without the benefit of legal opinions, warrants, or amassing additional manpower. The selection and provision of police officers having sufficient strength, intellect, and developed ability to learn and discharge the tremendous variety of mental and physical duties within the discretion and demands of the office is among the most essential, fundamental, critical, and integral governmental functions that a City has. This power is coupled

with the duty to the citizens and taxpayers to use judgment in such decisions so as to minimize the risk of injury, violation of rights, etc. and the resultant workers' compensation claims and suits for damages, including the wide variety revealed in the annotations to 42 U.S.C. 1983. Decisions to this end have been sustained, e.g., that a police officer be required to pass a reading comprehension test was held constitutional in *Washington v. Davis* (1976), 426 U.S. 229 and the requirement that police be at least 5'8" to insure the strength or appearance of strength relative to actual or potential force encounters with the average arrestee who is on the average 5'9", 150-170 lbs., and under 30 years of age and male more often than not, was held valid and non-violative of the 14th Amendment in *Smith v. City of East Cleveland, aka, Smith v. Troyan, supra.*

From another historical perspective we find that until recently, i.e., 1971 (See *Reed v. Reed,* 404 U.S. 71 (1971)), that the U. S. Supreme Court rejected charges of sex discrimination, according to "CONSTITUTION OF THE UNITED STATES OF AMERICA", revised and annotated 1972 (compiled and published pursuant to Public Law 91-589, 84 Stat. 1585, 2 U.S.C. Section 168), in the tones quoted at page 1509.

The evolution of accepted customs and perspective in our nation regarding equality on the basis of sex is still in flux, e.g., proposed Amendment 27 (ERA) has been debated, but not ratified, since March 22, 1972. As a nation, we have evolved from a physically oriented, mixed agrarian-pioneer society to a highly industrialized society which utilizes labor saving machines that males and females can both effectively operate more often than not; this all occurring while old world segments of population, mostly European, together with their cultures, have been annexed by immigration.

The 9th Circuit decision is unfair, is lacking in historical perspective, fails to come to grips with the difference between "regulating" Commerce as Title VII was originally intended and "enforcing" the 14th Amendment (the basis upon which Title VII was extended to States and their political subdivisions on March 24, 1972, see *Fitzpatrick v. Bitzer* (1976), 427 U.S. 445) relative to the selection and provision of police officers, and is in conflict with the letter and spirit of Title VII (42 U.S.C. 2000e et seq.) and numerous high court decisions: *Smith v. Troyan, supra; Washington v. Davis, supra; Oregon v. Mitchell,* 400 U.S. 112 (1970); *National League of Cities v. Usery,* 426 U.S. 833 (1976); and *Dothard v. Rawlinson,* 433 U.S. 321 (1977). In *Washington v. Davis, supra,* "intent" in the use of a facially neutral selection test was held to be an essential element of establishing a constitutional violation; Title VII makes reference to "intent" as an enforcement prerequisite at 42 U.S.C. 2000e-2(h) and 42 U.S.C. 2000e-5(g). In *Smith v. Troyan, supra,* the court held that full weight may be given to critical functions that take only a small amount of time, i.e., police officers must be fully capable of physically arresting the average 5'9", 170 lbs. accused or solving a murder case, etc., regardless of how often those events occur. All rescue and protective work involves periods of standby routine, but requires dedicated individuals physically and mentally ready, willing and able to rise to the occasion whenever the need for their rescue services arises, no matter how often. See "lifeguard" example cited at 520 F.2d 496. In *Dothard v. Rawlinson, supra,* a height requirement for prison correctional counselor was held invalid for want of *any* evidence in support thereof, a gender classification was sustained on nonstatistical evidence, and three justices concurred that the evidentiary burden could be shouldered by offering evidence or making legal arguments not dependent on new evidence,

e.g., appearance of strength, which were not presented to the District Court (See 433 U.S. 321 *Id.* at 337-340).

In *Oregon v. Mitchell*, 400 U.S. 112 (1970), a voting rights case, at page 128, the Court found that the Congressional enforcement power under Section 5 of the 14th Amendment is not unlimited and that there are at least three limitations, to wit: (1) Congress may not by legislation repeal other provisions of the Constitution; (2) The power granted was not intended to strip the States of their power to govern themselves or to convert our national government of enumerated powers into a central government of unrestrained authority over every inch of the whole nation; and (3) Congress may only "enforce" the provisions of the amendment and may do so only by "appropriate legislation."

Both *Katzenbach v. Morgan*, 384 U.S. 641 (1966), the narrow exception grafting decision relied upon by the lower court, and *Oregon v. Mitchell, supra*, referred to *McCulloch v. Maryland*, 4 Wheat. 316, 421, 4 L. Ed. 2d 579, 605:

> "Let the end be legitimate, let it be within the scope of the Constitution, and *all means which are appropriate*, which are *adopted to that end* which are *not prohibited*, but consist with the *letter and spirit* of the Constitution, are constitutional." (emphasis added).

As stated in *National League of Cities v. Usery, supra*:

> "Congress may not exercise that power so as to force directly upon the States its choices as to how essential decisions regarding the conduct of integral governmental functions are to be made."

CONCLUSION

The U. S. Supreme Court should grant certiorari in the within matter for the numerous compelling reasons stated. Even if the evidence for summary judgment is eventually found insufficient, retrial and trial of numerous other cases could be given proper constitutional perspective by the court's consideration and decision in this case.

Respectfully submitted,

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Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

Brief of the Personnel Testing Council of Southern California as Amicus Curiae.

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A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT.

THE PERSONNEL TESTING COUNCIL OF SOUTHERN CALIFORNIA, AS AMICUS CURIAE.

This brief of the Personnel Testing Council is filed pursuant to Rule 42(1) of the Rules of the Supreme Court.

Interest of Amicus Curiae.

The Personnel Testing Council of Southern California is one of the oldest organizations in the United States devoted to personnel testing and selection. Membership consists of personnel and industrial psychologists, per-

sonnel specialists and other professionals interested in advocating the use of fair and non-discriminatory employment practices. The Personnel Testing Council of Southern California files this brief out of the concern that vital matters affecting employee aptitude testing and personnel selection are at issue.

Introduction and Summary of Argument.

The Ninth Circuit Court of Appeals' decision in *Blake v. City of Los Angeles* would create widespread confusion in the personnel testing community because it: (1) creates an unreasonable standard for test validation, and (2) effectively prevents testing for the best qualified job applicant.

To rebut a *prima facie* showing of discrimination in a testing case, the Ninth Circuit would require an employer to establish that a selection procedure is "intimately related" to "safe and efficient job performance."

This standard is both too stringent and too lax. First, the standard is too stringent because a selection device that is demonstrably a reasonable measure of the job would be insufficient to establish that a selection device is job-related under the Ninth Circuit's "intimately related" test. This conflicts with the holding of this Court in *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971) that a test must be a "reasonable" measure of job performance. Amicus urges that validation evidence should be treated like any other evidence. *International Brotherhood of Teamsters v. U.S.*, 431 U.S. 344 (1977). Where the trier of the fact is convinced that the selection procedure more likely than not is a reasonable measure of the job, the test should be considered valid and job-related.

Second, the Ninth Circuit's standard is too lax because it limits test validation to safe and efficient job performance. This prohibits an employer from selecting an employee on the basis of *excellent* job performance. A police officer is a prime example of a job where selection of the best qualified candidate is a necessity. Furthermore, lowering selection standards to only safe and efficient job performance would conflict with civil service laws which presume selection of the best candidate. It would also preclude a private employer from exercising the necessary flexibility to operate its business at maximum capability.

ARGUMENT.

A. Employers Should Be Permitted to Validate Selection Devices by a Demonstrably Reasonable Measure of the Job.

The Ninth Circuit's decision fundamentally misconstrues a footnote from *Dothard v. Rawlinson*, 433 U.S. 321 (1977), and elevates "business necessity" beyond demonstrable "job-relatedness." The court in *Blake* stated:

> "It is not enough that the device selects characteristics that may have some rational relationship to job performance; the discriminatory employment practice must be shown to be necessary to a safe and efficient job performance to survive a Title VII challenge. *Dothard v. Rawlinson*, 433 U.S. 332 n. 14."

The Ninth Circuit interprets this to mean that a validation defense is "very narrow." (Appendix A, Petitioner's Writ of Certiorari, p. 17, hereinafter referred to as "App. A.") The Ninth Circuit would require that a selection device be "intimately related" to the job. (App. A, p. 28) This directly conflicts with *Griggs*, which held that if a selection device has a discriminatory effect, the employer is then required to prove that the test is "demonstrably a *reasonable measure* of job performance." *Griggs v. Duke Power Co., supra* at 424.

The "intimately related" standard also conflicts with *United States v. State of South Carolina*, 445 F.Supp. 1094, 1115 (DSC 1976), affirmed 434 U.S. 1026 (1978):

> "We think that Griggs did *not* import into Title VII law the concept of 'compelling interest' developed as a part of the 'strict scrutiny' standard for assessing certain classifications under the Fourteenth Amendment. Under this concept, the Court would balance disparate impact on blacks against the business purpose of the employer and uphold the business practice only if it were sufficiently 'compelling' to overcome the disparate impact." (Emphasis added)

Thus, a "compelling interest", "strict scrutiny" or "intimately related" standard should not be applied in judging the validity of a test. This is only reasonable in view of the purpose of testing.

A test is useful to an employer to the extent that it is able to predict that those applicants who do better on a test will perform relatively better on the job. See, *e.g.*, E. McCormick and J. Tiffin, *Industrial Psychology* 98 (6th Ed. 1974). A testing device is thus relative by its very nature: the better the test, the better it is able to distinguish the less qualified from the more qualified applicant. The extent to which a test is capable of predicting the success of employees on the job is the test's "validity."

A validation study of test validity is, therefore, like any other evidence: its persuasiveness depends "upon all the surrounding circumstances." *International Brotherhood of Teamsters v. United States, supra* at 340. Any rational evidence that tends to show that a selection process is job related should, therefore, be considered and weighed by the trial court.

Furthermore, any one alleged shortcoming under the EEOC Selection Guidelines, 29 C.F.R. §1607 *et seq.*, should not require that a test meet higher standards than are set by the guidelines themselves. Amicus submits that the EEOC Selection Guidelines should be

considered only as guidelines and not minimum requirements as the Ninth Circuit implies.

The Ninth Circuit decision itself demonstrates the importance of the trial court weighing all of the surrounding circumstances and alleged shortcomings under the EEOC Selection Guidelines. The Court criticizes the Los Angeles Police Department's validation study because it does not include persons under the minimum height requirement. The Court states that there may be circumstances in which it would be advantageous for a police officer to be short because the police officer could then look underneath objects (App. A, p. 22 note 7). Without passing final judgment on the persuasiveness of their particular argument, Amicus contends that a trial court could possibly find that this alleged evidentiary shortcoming would not be fatal to a validity study, which otherwise demonstrates that height is a reasonable measure of job performance for a police officer.

B. Employers Should Be Able to Test for the Best Possible Candidate.

The Ninth Circuit's decision also limits a validation study to establishing job characteristics that are "necessary to safe and efficient job performance." (App. A, pp. 19-20). According to the Ninth Circuit this means a test could not be validated to permit selection of the best possible candidate. This is in direct contradiction with this Court's holding in *Griggs* that Title VII ". . . expressly protects the employer's right to insist that any prospective applicant, negro or white, *must meet the applicable qualifications*", citing a memorandum of Senators Case of New Jersey and Clark

of Pennsylvania, managers of the bill on the Senate floor. *Griggs v. Duke Power Co., supra* at 434.

The Ninth Circuit's decision would also play havoc with virtually every civil service system because civil service laws often require that the best possible candidate be selected:

> "Civil service laws, like civil rights laws, were enacted to ameliorate a social evil. In the former case, it was the spoils system; in the latter, discrimination. To the citizens of the State of New York, civil service was sufficiently important that they mandated its use by their constitution. In so doing, they 'declared in unmistakable terms that merit, ascertained as therein provided, shall govern appointments and promotions in the public service', and that merit must be ascertained as far as practicable by competitive examination." *Kirkland v. New York Services*, 520 F.2d 420, 428 (2d Cir. 1975).

Therefore, Amicus submits that the "safe and efficient" standard set by the Court in *Blake* be rejected, and that testing be permitted to select the best possible job applicant.

Conclusion.

In *Sweeney v. New Hampshire State College*, ... U.S. ....., 58 L.Ed.2d 216 (1978), this Court clarified the burden of proof in an individual disparate treatment case, which was originally enunciated in *McDonell-Douglas Corp. v. Green*, 411 U.S. 792 (1973).

Amicus submits that *Blake* clearly calls for a similar clarification in a testing case. This Court has never required that testing be limited to establishing safe

and efficient job performance. Nor has this Court ever required that a test be "intimately related" to job performance where a test can be shown to be demonstrably a reasonable measure of the job. Accordingly, Amicus respectfully requests that the Court grant certiorari to ensure that testing be permitted where it can be shown to be demonstrably a reasonable measure of the job.

Dated: August 24, 1979.

Respectfully submitted,

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BRIEF OF COWLITZ COUNTY, WASHINGTON, AS AMICUS CURIAE

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To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

Cowlitz County, a political subdivision of the State of Washington, an amicus curiae herein, prays that a writ of certiorari issue to review the judgment of the Ninth Circuit Court of Appeals entered in the above-entitled case on May 2, 1979.

IDENTITY OF AMICUS CURIAE

Amicus petitioner Cowlitz County, a political subdivision of the State of Washington, by and through Henry R. Dunn, Cowlitz County Prosecuting Attorney and authorized law officer thereof, files this amicus curiae petition pursuant to Rule 42(4).

QUESTIONS PRESENTED

Amicus curiae petitioner presents two questions, both pertaining to the Blake litigation:

1. Once an employer demonstrates the manifest relationship of its employment standard to the legitimate police practices necessary for safe and efficient law enforcement in its community, does Title VII require the employer to change its method of law enforcement so that it may use an employment selection device that will allow consideration of the largest number of minority applicants?

2. Can the employer prove the "manifest relationship" or "business necessity" of a facially neutral employment standard by any competent relevant evidence, or is the admissible evidence

limited to only that presented by a formal validation research study done pursuant to EEOC guidelines?

STATEMENT OF AMICUS CURIAE PETITIONER'S INTEREST IN CASE

Cowlitz County is located approximately sixty miles north of Portland, Oregon, and 120 miles south of Seattle, Washington. It has a total population of approximately 70,000. The Cowlitz County Sheriff is the law enforcement officer for portions of the county outside incorporated cities and has approximately 45 sworn deputies to cover approximately 1,120 square miles. Approximately 30,000 people live in the incorporated portions of Cowlitz County.

Because of the sparse population served by the Sheriff's deputies and difficulty in obtaining backup support, Cowlitz County relies upon its individual officers to be able to use minimum force to control situations and suspects much the same as does the City of Los Angeles.

Cowlitz County uses height as one of its selection devices for determining which candidates are more likely to make good deputy sheriffs than others. The county has been sued under state statute concerning its height standard and faces potential action under Title VII. Washington state laws against discrimination are substantially similar to the federal. The Washington Supreme Court looks to decisions of this Court and the Ninth Circuit for guidance in interpreting

Washington statutes, as do many other states. Stieler v. Spokane School District, 88 Wn. 2d 68, 558 P.2d 198 (1977). Both sides in the Cowlitz County height discrimination case have agreed in principal that the federal standards for proof will be used to resolve our case.

Thus, Cowlitz County, like many other law enforcement agencies across the country, is vitally interested in and affected by the decision of the 9th Circuit in the Blake case and respectfully requests that this Court review the issues presented herein.

REASONS FOR GRANTING WRIT

ISSUE 1

TITLE VII DOES NOT REQUIRE THE MODIFICATION OF LEGITIMATE PRACTICES NECESSARY FOR SAFE AND EFFICIENT LAW ENFORCEMENT SIMPLY BECAUSE THE MODIFICATION WOULD ALLOW CONSIDERATION OF A LARGER NUMBER OF MINORITY APPLICANTS.

The Court of Appeals in deciding Blake made, in a different fashion, the same mistake corrected by this Court in Furnco Const. Corp. v. Walters, 438 U.S. 567 (1978). Reading the Blake case as a whole, the Court of Appeals held that Title VII required law enforcement agencies to change any selection standard that was a prima facie violation of Title VII if the agency could in any manner modify their methods to require less physical

skills. App. A, page ____ (page 24-25 slip opinion).

The Blake decision is contrary to Furnco. This Court noted in Furnco that changing the employment practice to consider the largest number of minority applicants was neither the purpose nor the spirit of Title VII. Id at 438 U.S. ____, 98 S.Ct. at 2949. If the employer can show a manifest relationship to the job, Title VII does not require changing effective, safe, and tested law enforcement practices. Id; Albe marle Paper Company v. Moody, 422 U.S. 405, 425 (1975). The concern of Title VII is whether the facially neutral standard is merely a "pretext" for unlawful discrimination, not what standards should be changed to allow the most minority applicants. Furnco

Const. Corp. v. Walters, supra, 438 U.S. at ____, 98 S.Ct. at 2950; Albemarle Paper Company v. Moody, 422 U.S. at 425.

ISSUE 2

THE NINTH CIRCUIT MISINTERPRETED TITLE VII'S STANDARDS FOR PROVING THE "MANIFEST RELATIONSHIP" OR "BUSINESS NECESSITY" OF A NEUTRAL EMPLOYMENT STANDARD WHEN IT HELD THAT ONLY A FORMAL VALIDATION RESEARCH STUDY COMPLYING WITH EEOC GUIDELINES (29 CFR §1607) COULD MEET THE "VERY HIGH DEGREE OF PERSUASION" REQUIRED TO REBUT THE PRIMA FACIE CASE MADE BY THE PETITIONER. App. A, page ___, (slip opinion page 18).

The 9th Circuit made a conceptual error in its decision. The basic focus of discrimination cases is whether the

employment standard is a pretext for excluding from employment otherwise qualified applicants because of their race, color, sex, or national origin. Id at 422 U.S. 425. By excluding evidence probative of job relatedness and directing the trial court to consider only formal validation studies, the 9th Circuit unlawfully restricted the employer in proving job relatedness. The City of Los Angeles' brief summarizes existing case law on the evidence necessary to show the business necessity of an employment standard. In addition to limiting the form of probative evidence, the 9th Circuit placed a new burden of proof on the employer by requiring a "very high degree of persuasion" to rebut the plaintiff's prima facie showing. App. A, page ____ (slip opinion page 18).

This burden is without authority in the law in cases decided under Title VII.

In limiting the evidence admissible to prove job relatedness, the 9th Circuit placed the smaller employer in a very difficult position. In order to resist a prima facie case for any kind of facially neutral standard, it must finance extensive professional validation studies. The small employer is barred by the decision from introducing evidence from observations and opinions of people experienced with the job of law enforcement. Amicus petitioners argue that the law allows the trial court in Title VII cases, as in any other case, to weigh the probative value of the various forms of evidence presented to it and decide job relatedness therefrom. The job relatedness of some employment

screening devices is observable by the ordinary person and could be proven without resort to expensive and possibly inconclusive studies. For example, a statistician or psychologist is not required to prove to the trial court that the ability to swim is necessary to being a lifeguard at a particular beach. Other employment screening devices, like the sophisticated personnel test used by the employer in Albemarle Paper Company v. Moody, supra, or the verbal abilities test of Washington v. Davis, 426 U.S. 229 (1976), may well, in the trial court's discretion, require a professionally prepared validation study to prove the manifest relationship to the job in question. The 9th Circuit erred when it held that opinion evidence does not prove job relatedness. App. A,

page ____ (page 19-20, slip opinion).

CONCLUSION

For the foregoing reasons, the City of Los Angeles' petition for writ of certiorari should be granted.

Respectfully submitted,

HENRY R. DUNN
Cowlitz County
Prosecuting Attorney

By FRED [illegible]RG
FRED A. KASEBURG
Chief Civil Deputy

July 11, 1979

MOTION FILED
FEB 20 1980

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1979
No. 79-54

CITY OF LOS ANGELES, et al.,

Petitioners,

vs.

FANCHON BLAKE, et al.,

Respondents.

CITY OF LOS ANGELES, et al.,

Petitioners,

vs.

UNITED STATES,

Respondent.

Amicus Curiae Petition for Writ of Certiorari To The United States Court of Appeals for the Ninth Circuit

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MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF AMICUS CURIAE OF THE LOS ANGELES POLICE PROTECTIVE LEAGUE

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OCTOBER TERM, 1979

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Amicus Curiae Petition for Writ of Certiorari to The United States Court of Appeals for the Ninth Circuit

MOTION OF THE LOS ANGELES POLICE PROTECTIVE LEAGUE FOR LEAVE TO FILE BRIEF AMICUS CURIAE

STATEMENT OF JURISDICTION

Pursuant to Rule 42(3) of The Rules of The Supreme Court, The Los Angeles Police Protective League respectfully moves the Court for leave to file a brief amicus curiae in the above-entitled case.

Consent to file an amicus curiae petition for a Writ of Certiorari has been granted by Mr. Neil C. Baker, Counsel for the Petitioners; however, Mr. Timothy B. Flynn, Counsel for Respondents Blake, et al., has declined to provide the requested consent.

INTEREST OF THE LOS ANGELES POLICE PROTECTIVE LEAGUE

The Los Angeles Police Protective League (hereinafter "the League") is a voluntary, fraternal organization consisting of approximately 6,600 members of the Los Angeles Police Department. The League is certified and recognized by The City of Los Angeles as the employee organization for the Los Angeles Police Department, and it represents its members in employment, disciplinary and, on occasion, legal matters.

The interest of the League in the Petition for a Writ of Certiorari submitted by the City of Los Angeles, et al., in United States of America v. City of Los Angeles and Blake v. City of Los Angeles stems from the severe impact on public and police officer safety that will occur if the Ninth Circuit's decisions are allowed to stand. In essence,

the Ninth Circuit in its decisions mandates the imposition of quota hiring of women and minorities, to the exclusion of the best qualified applicants for the entry-level police officer position. It is the League's belief that such a result will jeopardize the quality of police services provided and thereby pose a serious threat to public and police officer safety.

In light of the foregoing, it is respectfully submitted that the interest of the League's membership in the pending Petition for a Writ of Certiorari in the United States of America v. City of Los Angeles and Blake v. City of Los Angeles cases is substantial and deserves articulation by means of the accompanying brief amicus curiae. The League recognizes that a substantial time lapse exists between the date the Petition for a Writ of Certiorari was filed and the instant date of this Motion for Leave to File a Brief Amicus Curiae, but it believes that recent developments on the Circuit Court level justify the late submission. In particular, the Ninth Circuit's grant of an Injunction Pending Appeal delineating specific hiring goals for women and

blacks adds a new dimension to the City of Los Angeles' petition for a Writ of Certiorari. In essence, the Ninth Circuit's imposition of hiring goals in advance of the trial of these companion cases on their merits represents a substantial first step in the restructuring of the racial and sexual composition of the Los Angeles Police Department. Further, to the extent that the Circuit Court's grant of the Injunction Pending Appeal portends a ruling adverse to the City of Los Angeles in the forthcoming hearing of Plaintiffs' appeals from the District Court's denial of their respective Preliminary Injunction Motions scheduled for March 3, 1980, this process will be accelerated. It is the League's belief that the de facto restructuring of the racial and sexual composition of the Los Angeles Police Department prior to an adjudication of the cases on their merits represents a dangerous gamble with public and police officer safety. This is a concern not heretofore fully articulated by the parties to this action.

CONCLUSION

For the above-stated reasons, the League strongly urges this Court to grant this Motion for leave to file the accompanying brief amicus curiae in support of the City of Los Angeles' pending Petition for a Writ of Certiorari, so that the legal research as well as the opinions and conclusions of the League's membership may be considered as therein provided.

Respectfully submitted,

COTKIN, COLLINS, KOLTS
& FRANSCELL

By George J. Franscell
GEORGE J. FRANSCELL

Attorneys for the
Los Angeles Police
Protective League

IN THE
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BRIEF AMICUS CURIAE OF THE
LOS ANGELES POLICE PROTECTIVE LEAGUE

STATEMENT OF JURISDICTION AND INTEREST OF AMICUS CURIAE

The statement of jurisdiction and interest of Amicus Curiae are set out in the Motion for Leave to File, supra.

SUMMARY OF ARGUMENT

In requiring an employer to establish

that its selection procedures are "intimately related" to "safe and efficient job performance" to rebut a prima facie showing under Title VII, the Ninth Circuit in Blake v. City of Los Angeles adopts a standard of proof impossible for the employer to meet. In the law enforcement context, the application of the Blake v. City of Los Angeles standard would result in the abandonment of physical selection procedures designed to identify the best qualified applicant, despite the demonstrated rational relationship of such selection procedures to the job of police officer.

Indeed, to the limited extent that an employer could establish that its challenged selection procedures were "intimately related" to job performance under the Blake v. City of Los Angeles standard, the Ninth Circuit would nevertheless require the employer to abandon their use absent a showing that such selection procedures are necessary to ensure a "safe and efficient" job performance by prospective employees. One consequence of this limitation of test validation to "safe and efficient" job performance, however, is to prohibit an

employer from selecting an employee on the basis of excellent job performance. In the law enforcement context, application of this rule would require police departments to restructure established law enforcement procedures in order to accommodate the merely "adequate" job performance of new entry-level police officers. The abandonment of established law enforcement procedures tailored to individual community needs would clearly harm the public interest.

In similar fashion, the Ninth Circuit's decision in United States v. City of Los Angeles represents a threat to public and police officer safety if allowed to stand. In reversing the District Court's issuance of a preliminary injunction enjoining the termination of LEAA funding, the Ninth Circuit failed to properly interpret the clear language of §518(b) of the Omnibus Crime Control and Safe Streets Act of 1968, as amended. In pertinent part, that provision proscribes the conditioning of any LEAA grant on the adoption of a "percentage ratio, quota system, or other program to achieve racial balance." The failure of the Ninth Circuit to uphold the District

Court's injunctive order on the basis of §518(b) represents an endorsement of the Justice Department's efforts to force the City of Los Angeles to adopt hiring goals or quotas for women and minorities, to the exclusion of the best qualified applicants.

ARGUMENT

I. UNDER TITLE VII OF THE CIVIL RIGHTS ACT OF 1965, AS AMENDED (HEREINAFTER "TITLE VII"), A LOCAL GOVERNMENT IS NOT REQUIRED TO ALTER ITS ESTABLISHED LAW ENFORCEMENT METHODS IN ORDER TO IMPROVE THE EMPLOYMENT OPPORTUNITIES OF MINORITY GROUP INDIVIDUALS WHO ARE UNABLE TO QUALIFY UNDER EXISTING PHYSICAL SELECTION STANDARDS THAT HAVE BEEN SHOWN TO BE JOB-RELTAED

In Blake, the Ninth Circuit ruled that under Title VII a local government is required to modify its established law enforcement methods in order to improve the employment opportunities of minority group individuals who are unable to qualify under job-related physical selection standards, so long as its legitimate interest in safe and efficient police officer performance is not jeopardized. Blake v. City of Los Angeles, 595 F.2d 1367, 1383 (9th Cir. 1979).

However, in adopting such a hiring rule, the Ninth Circuit's decision directly conflicts with this Court's Furnco Construction Corp. v. Waters, 438 U.S. 567 (1978) ruling. In Furnco Construction Corp., this Court was faced

with a situation where the employer had successfully rebutted a prima facie showing by minority job applicants under Title VII, but the Court of Appeals nevertheless imposed a "corrective" hiring regimen intended to increase the number of minority job applicants that the employer considered. Id. at 574. In reversing the Circuit Court's holding, this Court stated that Title VII "does not impose a duty to adopt a hiring procedure that maximizes hiring of minority employees" until at least a violation of Title VII has been established. Id. at 577-78.

In reviewing decisions like the Circuit Court's in Furnco Construction Corp. and the Ninth Circuit's in Blake, it is important to recall that the primary purpose underlying Title VII is to ensure that employment decisions are made only on the basis of merit, without regard to race, religion, color, sex or national background. Once the employer rebuts a prima facie showing under Title VII by demonstrating that its selection procedure is job-related, then the employer's established procedure should not be subject to judicial reform, since

it more likely than not is based on merit considerations. To rule otherwise, in the law enforcement context, would operate to deprive police departments of the flexibility needed to tailor their services to the demands of the particular communities they serve. See J. Wilson, Varities of Police Behavior (1968).

To this end, it is important to recognize that the imposition of a hiring goal on the City of Los Angeles in the Ninth Circuit's recent issuance of an Injunction Pending Appeal conflicts with the City of Los Angeles' established system of civil service merit selection. As noted by the Second Circuit, civil service merit selection does not operate as a pretext for racism:

> "Civil Service laws, like civil rights laws, were enacted to ameliorate a social evil. In the former case, it was the spoils system; in the latter, discrimination.... It seems to us that the judiciary should act with great reluctance in undermining traditional civil service concepts and if a decision is to be made to subordinate the social purposes of civil service to those of equal employment opportunity, that decision should be made by the people, speaking through

their legislators." Kirkland v. N.Y. State Department of Correctional Services, 520 F.2d 420, 428-29 (2nd Cir. 1975), Certiorari denied, 429 U.S. 823 (1976).

Absent a showing that the City of Los Angeles' selection procedures for the entry-level police officer position are not job-related and therefore violative of Title VII, it appears proper to conclude that its established procedures are protected from judicial reform. Certainly, the Circuit Court's imposition of a hiring goal by way of its recent issuance of an Injunction Pending Appeal contravenes this Court's ruling in Furnco Construction Corporation v. Waters, supra. Further, to the extent that the Ninth Circuit's grant of the Injunction Pending Appeal portends a ruling adverse to the City of Los Angeles in the forthcoming March 3, 1980 hearing of Plaintiffs' appeals from the District Court's denial of their respective preliminary injunction motions, this situation will be exacerbated.

II. THE NINTH CIRCUIT'S DECISION IN BLAKE CONFLICTS WITH EXISTING LAW AND, IF ALLOWED TO STAND, WOULD PLACE AN INSURMOUNTABLE BURDEN ON LAW ENFORCEMENT AGENCIES TO DEMONSTRATE THE LAWFULNESS OF THEIR SELECTION PROCEDURES

Under the Blake holding, an employer is required to establish that its selection procedures are "intimately related" to job performance to rebut a prima facie showing under Title VII in a testing case. Blake v. City of Los Angeles, supra, at 1381. In order to satisfy this job-relatedness standard, the Ninth Circuit mandates that the employer must submit a formal validation study that strictly complies with the EEOC Guidelines (29 C.F.R. §1607 et seq.)[1/] or be subject to an otherwise "[much heavier] burden of justification." Id at 1379. Further,

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1/ Subsequent to the filing of the companion actions, the EEOC Guidelines were superseded by the Uniform Guidelines on Employee Selection Procedures, 43 Fed. Reg. 38290 (Aug. 25, 1978). For the purpose of this brief, reference to the EEOC Guidelines is inclusive of the successor Uniform Guidelines.

the Ninth Circuit intimates that the "predictive" validation procedure is required to the exclusion of the other validation procedures specified in the Guidelines. Id. at 1379-1382.

A. THE NINTH CIRCUIT'S DECISION IN BLAKE CONFLICTS WITH EXISTING CASE LAW

The adoption of an "intimately related" standard by the Ninth Circuit directly conflicts with this Court's holding in Griggs v. Duke Power Company, 401 U.S. 424 (1971). Faced with an employee's hiring requirement that job applicants and transferees, inter alia, pass a standardized general intelligence test, this Court held that the employer was required to prove that the test was "demonstrably a reasonable measure of job performance" to justify the test's discriminatory effect. Id at 424 (emphasis added).

In addition, the "intimately related" standard conflicts with a major decision of a three-judge District Court in United States v. State of South Carolina, 445 F. Supp. 1084 (D.S.C. 1976), affirmed by this Court, 434 U.S. 1026 (1978). In pertinent part, the three-judge panal concluded:

> "We think that Griggs did not impart into Title VII law the concept of compelling interest' developed as a part of the 'strict scrutiny' standard for assessing certain classifications under the Fourteenth Amendment. Under this concept, the Court would balance disparate impact against [minority groups protected under Title VII] against the purpose of the employer and uphold the business practice only if it were sufficiently 'compelling' to overcome the disparate impact." 445 F. Supp. at 1115 (emphasis added).

In light of the foregoing reasoned conclusion of the three-judge panal in United States v. State of South Carolina, it is clear that the proper test to apply in judging the validity of a selection procedure is whether it is a demonstrably reasonable measure of the job, as opposed to a "compelling interest", "strict scrutiny", or "intimately related" test.

In similar fashion, the Ninth Circuit's mandate that an employer must submit a formal validation study that strictly complies with the EEOC Guidelines is erroneous. Such a conclusion is supported by a review of relevant case law addressing the issue. With respect to the decisions of this Court,

it was noted in Washington v. Davis, 426 U.S. 229, 247, footnote 13:

> "It appears beyond doubt by now that there is no single method for appropriately validating employment tests for their relationship to job-performance."

In Washington v. Davis, supra, this Court addressed the validity of a written test for verbal skills administered to applicants for police officer positions, which had a disproportionate impact on blacks. In discussing the validity of the selection procedure in a Title VII context, this Court held that the District Court's grant of summary judgment for defendants was proper on the basis that "a positive relationship between test and training course performance was sufficient to validate the [test]," despite the fact that the (1970) EEOC Guidelines did not expressly permit validation by correlation to training performance. Id. at 249. In reaching such a result, this Court noted that it "seems to us the much more sensible construction of the job-relatedness requirement," Id at 251.

The Washington v. Davis decision is noteworthy because it constitutes the

first instance in which this Court focused on the requisites for an employer to successfully establish job-relatedness. In two earlier decisions, this Court wrestled with the concept of job-relatedness, but in the context of situations where the defendant employer did not present validation evidence which under any reasonable standard demonstrated the job-relatedness of its challenged selection procedures. Griggs v. Duke Power Co., supra, at 431 [The requirements in issue did not bear a demonstrable relationship to successful performance of the jobs "and were adopted without meaningful study of their relationship to job-performance ability"]; Ablemarle Paper Co. v. Moody, 422 U.S. 405 (1975) [The challenged testing was implemented without analysis of the particular skills of the jobs involved or evidence of significant correlation between test results and job performance.] Accordingly, this Court's decision in Washington v. Davis represents the authoritative pronouncement on the subject of job-relatedness, and it does not constitute a departure

from this Court's earlier decisions.[2/]

In this Court's pronouncements on employment selection procedures following Washington v. Davis, there is no suggestion that an employer must validate its selection procedures through strict compliance with the EEOC Guidelines, or face an otherwise heavier burden of justification. See, e.g., New York City Transit Authority v. Beazer, — U.S. —, 99 S.Ct. 1355 (1979) [The employment

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[2/] In viewing Ablemarle Paper Co. v. Moody, it is important to note that this Court, in evaluating the employer's testing program under specific provisions of the Guidelines, did not state whether it was necessary that an acceptable validation must adhere to all the technical provisions of the Guidelines. Further, it should be recognized that the majority opinion departed from the Guidelines on the important issue of which party shoulders the burden of demonstrating the availability of suitable alternatives which would have a lesser discriminatory impact, in the event the employer demonstrates the business necessity of its selection procedures. Contrast Ablemarle Paper Co. v. Moody, supra, at 425 and 436, with 29 C.F.R. §1607.3(b). In sum, it appears that this Court in Ablemarle Paper Co. did not mandate slavish adherence to the EEOC Guidelines.

exclusion of individuals receiving methadone treatment upheld as "job related" without any discussion of formal validation evidence]; Furnco Construction Co. v. Waters, supra, [upheld employer's practice of hiring only experienced and highly qualified bricklayers, without discussing whether employer required to validate its selection procedures pursuant to the EEOC Guidelines]; and Dothard v. Rawlinson, 433 U.S. 321 (1977) [upheld finding that height and weight requirements for position of prison guard was not demonstrated to be job-related where no evidence introduced to support this contention]. Further, in other contexts, this Court has declined to accord the EEOC Guidelines controlling weight. See General Electric Co. v. Gilbert, 429 U.S. 125, 140-145 (1976) [exclusion of pregnancy-related disabilities under employer's disability benefits plan upheld despite provision of EEOC Guidelines requiring coverage]. The apparent refusal of this Court to require an employer to slavishly adhere to the EEOC Guidelines in establishing the job-relatedness of its selection procedures is supported by Appellate decisions in the Second, Fifth, Seventh,

Eighth and Tenth Circuits.[3] In addition, a three-judge panal in United States v. State of South Carolina, supra, supports the conclusion that the EEOC Guidelines are, as their title suggests, guides rather than absolute proscriptions. [In United States v. State of South Carolina, the three-judge panal accepted as evidence a validation study presented by the employer, despite its methodological deficiencies as measured by the EEOC Guidelines].

In sum, a review of the relevant case law establishes that validation evidence should be treated like any other evidence. Int'l Brotherhood of Teamsters v. United States, 431 U.S. 344 (1977). Admittedly, a body of Circuit and District Court decisions exists which interprets the general endorsement of the 1970 Guidelines in Griggs v. Duke Power Co. to require virtually literal compliance with the Guidelines by the employer to establish job-relatedness. See, e.g., Kirkland v. State Dept. of Correctional

[3] These decisions are discussed in the City of Los Angeles' Petition for a Writ of Certiorari, pp. 22-23, footnote 19.

Serv., supra. In large part, however, these decisions occurred before this Court's authoritative Washington v. Davis decision. To the extent, however, that Appellate and District Court decisions subsequent to Washington v. Davis support the Ninth Circuit's endorsement of literal compliance with the EEOC Guidelines in its Blake ruling, a resolution of the jurisdictional conflict by this Court is necessary.

B. IF ALLOWED TO STAND, THE NINTH CIRCUIT'S DECISION IN BLAKE WOULD PLACE AN INSURMOUNTABLE BURDEN ON LAW ENFORCEMENT AGENCIES TO DEMONSTRATE THE LAWFULNESS OF THEIR SELECTION PROCEDURES

If allowed to stand, the Ninth Circuit's mandate in Blake that an employer must submit a formal validation study that strictly complies with the rigid technical requirements of the EEOC Guidelines to demonstrate the job-relatedness of its challenged selection procedures will result in the abandonment in this Circuit of all selective testing procedures that adversely impact any one group protected under Title VII. Instead, employers will primarily utilize hiring

ratios of minority, female and caucasian male employees, without regard to relative qualifications.

This conclusion that an employer will utilize hiring ratios in situations where its existing selection procedures adversely impact a racial or sex group is supported by the consideration that the employer faces tremendous back pay liability and attorney fee costs in Title VII litigation. In addition, the expense of validating selection procedures pursuant to the EEOC Guidelines is extreme and often prohibitive. See United States v. State of New York, 475 F. Supp.1103 (S.D. N.Y. 1979 [Content validation study, very expensive and performed with the assistance of The United States Civil Service Commission, found deficient]. And, in the law enforcement context, the defendant employer risks the termination of its federal funding if its selection procedures are challenged, as illustrated by the instant United States v. City of Los Angeles litigation.

Aside from the obvious economic compulsion on employers to adopt hiring quotas under the Blake decision, it is

important to note that test validation pursuant to the technical requirements of the EEOC Guidelines is often practically or technically impossible. Indeed, in those jurisdictions where the courts only accept criterion-related studies as evidence of compliance with the EEOC Guidelines, the incidence of validation studies that passed judicial scrutiny is extremely low. 4/

With respect to the Blake decision, it appears that the Ninth Circuit adopts the position that it will only accept "predictive" validation studies as evidence of the job-relatedness of challenged selection procedures, as evidenced by its assertion that the City of Los Angeles' exacting validation studies "[were] of little value" because they did not include individuals excluded by the selection

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4/ See Deposition of William H. Enneis, attached as Exhibit B to the Amicus Brief of the Executive Committee of the Division of Industrial Organizational (Division 14) of The American Psychological Association, filed with the Supreme Court in Washington v. David, supra.

standards in question. Blake v. City of Los Angeles, supra, at 1380. This limitation of validation evidence to only "predictive" studies, however, contravenes the EEOC Guidelines themselves,[5/] and is of questionable wisdom in situations where the adverse consequences of employing unqualified individuals for testing purposes could be severe. To this end, the position of entry-level police officer is a prime example of a job where the potential of harm resulting from employment of unqualified individuals precludes the implementation of a "predictive" study.

Independent of the above-stated safety considerations, the Ninth Circuit's mandate in Blake that an employer must hire unqualified individuals to test the validity of its selection procedures overlooks the practicalities of civil service laws in the sphere of public employment. Once individuals are hired by

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5/ See 29 C.F.R. §1607.5. The EEOC Guidelines do not express any preference between the "predictive" and "concurrent" validation techniques.

a public employer, they typically acquire a vested right to their employment position. Accordingly, it is unclear whether a state or municipal employer would ever undertake a "predictive" validation study, since the unqualified individuals hired for the purpose of testing the challenged selection procedures could not be discharged following conclusion of the study.

In light of the above-illustrated myriad of difficulties that would confront an employer in conducting a validation test pursuant to the Blake standards, it appears proper to conclude that employers would follow the path of least resistence and adopt hiring quotas in those situations where their existing selection procedures have an adverse impact on any group protected under Title VII. Such a result, however, is in stark contrast to the purpose underlying the enactment of Title VII, as recognized by this Court in Griggs v. Duke Power Co., supra, at 434, citing to a memorandum of Senators Case of New Jersey and Clark of Pennsylvania, managers of the bill on the Senate floor:

> "[T]he very purpose of Title VII is to promote hiring on the basis of job qualifications, rather than on the basis of race or color."

The above-quoted language exemplifies that Title VII was enacted to ensure equal opportunity, as opposed to requiring affirmative action, in hiring by employers. This Court's review of the Blake decision is necessary to preserve this fundamental distinction.

III. PURSUANT TO §518(b) OF THE OMNIBUS CRIME CONTROL AND SAFE STREETS ACT OF 1968, AS AMENDED, THE NINTH CIRCUIT'S REVERSAL IN UNITED STATES V. CITY OF LOS ANGELES OF THE DISTRICT COURT'S ENJOINMENT OF THE TERMINATION OF FEDERAL FUNDING WAS IMPROPER

The failure of the Ninth Circuit to uphold the District Court's injunctive order represents an endorsement of the Justice Department's efforts to force the City of Los Angeles to adopt hiring goals or quotas for women and minorities regardless of the effect on public and police officer safety. It is the League's belief that the imposition of hiring quotas on the Los Angeles Police Department will result in the abandonment of law enforcement policies and procedures tailored to the demands of the community it serves.

The League urges this Court to review the Ninth Circuit's decision in light of §518(b) of the Omnibus Crime Control and Safe Streets Act of 1968, as amended, (42 U.S.C. §3766(c)(2)(e)). §518(b) proscribes the conditioning of any LEAA grant on the

adoption of a "percentage ratio, quota system, or other program to achieve racial balance." It is the League's position that the clear language of §518(b) proscribes the Justice Department's attempt to condition LEAA funding on the adoption of racial and sex quotas by the City of Los Angeles and, accordingly, that the Ninth Circuit's reversal of the District Court's order enjoining the termination of such funding was improper.

CONCLUSION

Essentially, the basic thrust of the Ninth Circuit's decisions in Blake v. City of Los Angeles and United States v. City of Los Angeles is to force employers to abandon all selection standards which might adversely affect any racial or sex group on a statistical basis. To accomplish this end, the Ninth Circuit adopts stringent validation requirements that impose unrealistic demands on employers to justify the necessity for their selection procedures.

The Ninth Circuit's adoption of such stringent validation requirements, however, conflicts with the decisions of this Court. Further, common sense dictates that the application of stringent validation requirements is inappropriate in the law enforcement context, where the high degree of harm to public safety that would result from the hiring of unqualified entry-level officers should lessen any corresponding need to demonstrate the job-relatedness of the challenged selection procedures.

The substantial reasons favoring this Court's review of the Blake v. City

of Los Angeles and United States v. City of Los Angeles decisions are heightened by the Ninth Circuit's imposition of hiring goals on the City of Los Angeles by injunctive order. It is the League's belief that the de facto restructuring of the Los Angeles Police Department occasioned by such an injunctive order contravenes the concept of local law enforcement control and may well threaten the quality of police services provided to the Los Angeles community.

For all the foregoing reasons, the League respectfully submits that a Writ of Certiorari should issue to review the judgment and opinion of the Ninth Circuit in the Blake v. City of Los Angeles and United States v. City of Los Angeles cases.

Respectfully submitted,

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